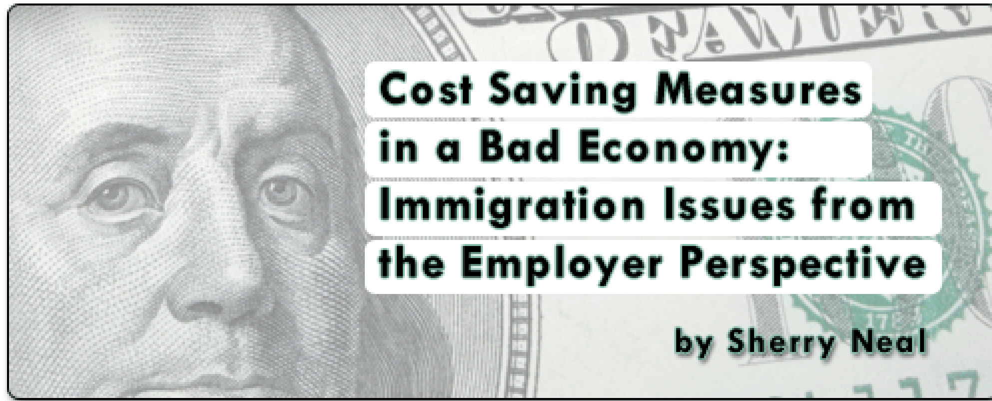

With the decline in the economy, companies that choose layoffs or reduction in pay of current employees as cost saving measures must be mindful of not only employment laws and HR policies but immigration laws as well. For both situations – layoffs and reduction in pay – it is important for the company to consider three questions:

(1) What are the legal requirements based upon the immigration status of the employee?
(2) What is the impact on the green card process for the employee?
(3) What is the impact on other employees?

Reduction in Pay:

A. Obligations based upon the employee's immigration status:

Companies who want to reduce the pay of a foreign worker must consider the immigration status of the employee. For example, an employee working on H-1B status must be paid the "required wage" as stated on the Labor Condition Application in the H-1B petition.[1] The required wage is the higher of the prevailing wage for the occupation in the area of intended employment or the actual wage the employer pays to other employees with similar qualifications in the place of employment where the H-1B worker works. While tough economic times may lead a company to reduce the "actual wage" paid to other employees, the "prevailing wage" does not decrease.

Here's what a company can do to reduce the overall yearly wage to an H-1b employee: file an amended H-1b petition to reduce the hours of employment. The company will still have an obligation to pay the required wage (higher of prevailing wage or actual wage) for the employee on an "hourly" basis for the hours listed in the petition but it can reduce the overall "yearly" rate as the employee's hours are reduced from full-time to part-time.

Likewise, an E-3 employee (Australian citizens working in the U.S. in a specialty occupation) and H-1B1 employee (Singapore or Chile citizens working in the U.S. in a specialty occupation) must also be paid the required wage as stated on the Labor Condition Application with the petition.[2] In other words, the employer must continue to pay the employee the prevailing wage as determined by a wage survey or the actual wage the employer pays similar employees in the area of employment. Any change to the hours of employment would require an amended petition just as it would in the case of an H-1B petition.

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[1] See 20 C.F.R. § 655.810 regarding penalties for failing to comply with LCA requirements ranging from $1,000 to $35,000 and debarment for up to three years.
[2] 20 C.F.R. § 655.730.

Foreign workers working in other nonimmigrant statuses such as TN (Canadian or Mexican citizens working in a professional occupation pursuant to the North American Free Trade Agreement) or L-1 intra-company transferees (managers/executives or individuals with specialized knowledge) do not have any wage obligations with their non-immigrant status. Likewise, companies can rest easy on pay reductions for foreign nationals working in F-1 status pursuant to optional practical training. The optional practical training is not employer-specific; it is available for employment with any employer within the foreign student's field of study. There is no minimum wage obligation other than the normal federal minimal wage standards under the Fair Labor Standards Act.

B. Impact on the employee's green card application:

While a reduction in pay is not necessarily fatal to a green card application for a foreign national, it can make an approval more difficult to obtain. With an employer sponsored green card, the company must show that it has the ability to pay the wages to the employee. While the employer is not obligated to actually pay the wages during the process, it must show the "ability" to do so. If the employee is working for the company and actually receiving the wage that was stated on the Labor Certification Application, it is easier for the company to prove the ability to pay. But if the employee is not receiving the wage, the company must show the ability to pay through other means such as profit or net current assets that equal or exceed the offered wage.

In addition, the Department of Labor regulations require an employer to be able to place the foreign national on the payroll. This differs from the requirement of having funds available to pay the beneficiary in that even if the employer is fiscally able to pay the foreign national, there could be other circumstances such as non-viability of the business itself or eliminating the job position which may prevent the employer from being able to place the foreign national on the payroll.

While a company may be able to reduce wages by reducing hours of employment and still comply with the wage requirements for the nonimmigrant status, it may be problematic for the green card process. The permanent residence process is for "full-time, permanent employment".[3] Since the permanent residence process is for prospective employment, there is no legal requirement that the employee work for the company during the process. However, if the foreign national does work for the employer during the process and the hours are reduced to part-time it becomes suspect on whether there remains a full-time, permanent position.

C. Impact on other employees:

A reduction in pay does not generally have an immigration impact on other employees of the company. While it can reduce the "actual wage" that it pays to employees, it doesn't affect the required wage for other H-1b applications if the prevailing wage is higher than the actual wage.

<u>Layoffs</u>

A. Obligations based upon the employee's immigration status:

A company that terminates H-1B workers has additional responsibilities that are not applicable to U.S. workers or foreign workers in other types of nonimmigrant status. For example, when a company

[3] 20 C.F.R. § 656.3.

terminates an H-1b worker, it must notify USCIS to withdraw the petition. [4] Without notifying USCIS, there is not sufficient proof of a "bona fide" termination; consequently, the employer can remain liable to continue paying the wages of the H-1b worker.[5] Upon terminating the H-1b worker, the company must also provide return transportation for the employee to return to his home country.[6]

Furthermore, H-1B regulations require employers to offer H-1b workers the same benefits that it offers to U.S. workers. Consequently, any severance package or other benefits offered to U.S. workers must be offered in the same manner to H-1B workers who are terminated.

Other nonimmigrant categories such as the TN or the L-1 do not carry an affirmative duty to notify USCIS nor do they require the employer to provide return transportation back home.

B. Impact to permanent residence application:

Some employees who are in the United States in temporary status may also have a pending green card application based upon their employment. For most employees, the process is a three-step process that includes: PERM labor Certification, I-140 Immigrant Petition, and I-485 Adjustment of Status. If the employee has an I-140 approved and an I-485 pending for at least 180 days, the employee is eligible to change to a different employer as long as the position is similar to the one listed on the green card application. In this case, the original employer does not have any legal obligation.

If the employee has not reached the final stage but at least has an I-140 petition approved, the employee can retain the priority date (filing date) on the application and use it for any future green card application although the employee would still have to do a completely new green card application with a new employer to get a green card.

However, if the individual is only in the Perm Labor Certification process or just has an I-140 petition pending but not yet approved, the individual who is laid off does not get any benefit from the green card application.[7]

C. Impact on other employees:

Employers must consider the impact that termination has not only on the H-1b employee but also other workers who the employer may want to petition for H-1B status in the future. For example, companies that receive TARP funding or are H-1b dependent must comply with more rigorous labor market rules if they hire foreign workers on H-1b.[8] TARP employers are those companies that receive Troubled Asset Relief Program (TARP) funding under the *American Recovery and Reinvestment Act of 2009*.[9] A company that has received money under the TARP program cannot file an H-1B petition if it has terminated a U.S. worker in the same occupation within the previous 90 days.

[4] 8 C.F.R. § 214.2(h)(11)(i)(A).
[5] 8 C.F.R. § 655.731(c)(7)(ii).
[6] 8 C.F.R. § 214.2(h)(4)(iii)(E).
[7] An exception may occur if the employer continues with the I-140 petition even after the individual has been laid off with an expectation that the individual will be resuming employment in the near future.
[8] "Willful violators" are also subject to the more rigorous H-1b rules; a willful violator is a company that has violated H-1b provisions willfully as determined by the Department of Labor. See 20 C.F.R. § 655.700.
[9] Public Law 111-5.

An H-1b dependent employer is one that has a certain percentage of H-1b workers: fewer than 25 total employees with more than 7 H-1B employees, between 26-50 total employees with more than 12 H-1B employees, or more than 50 total employees with 15% of its workforce being H-1B visa holders. An H-1B dependent employer cannot file an H-1B if it has terminated a U.S. worker in that same occupation and area of intended employment within the previous 90 days.[10]

A company who is preparing to file an application for permanent residence for an employee must look back at other layoffs in the previous six months. In the first stage of the green card process, the employer must file for "labor certification" by proving that there are not any U.S. workers qualified, willing and available for the offered employment.[11], Since labor certification is market driven, any layoffs by the company within that same occupation and area of employment listed on the application for labor certification can certainly impact the labor certification.[12] For example, prior to filing an application for labor certification, the employer must read and truthfully answer the question on the Form 9089 pertaining to layoffs which specifically states as follows:

> Has the employer had a layoff in the area of intended employment in the occupation involved in this application or in a related occupation within the 6 months immediately preceding the filing of this application?
>
> If yes, were the laid off U.S. workers notified and considered for the job opportunity for which the certification is sought?

A layoff is not necessarily fatal to a new PERM application. For example, the employer must consider each portion of the lay-off question on the Form 9089. Specifically, it is only detrimental if there has been: (1) a layoff (involuntary separation of a worker without case); (2) U.S. worker; (3) in the area of intended employment: (4) within the past 6 months. Furthermore, even if those conditions are met, if the employer has notified and considered the laid off U.S. workers for the job opportunity and the U.S. workers are not be available for the position, then the PERM application can continue on behalf of the new employee.

Conclusion

Layoffs and reduction in pay can be effective cost saving measures for a company. However, they can have the opposite effect and be very costly for companies with a diverse workforce if the company does not comply with the immigration requirements in addition to the employment laws.

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Please visit www.HammondLawFirm.com for additional articles and resources.

[10] 20 C.F.R. § 655.737.
[11] Some occupations such individuals that qualify as Extraordinary Ability, Exceptional Ability, or National Interest Waiver, Multi-National Executives and Mangers or Schedule A Healthcare occupations of Professional Nursing and Physical Therapy do not have to enter the Labor Certification process. Therefore, they are exempt from the labor market test.
[12] The labor certification program is designed to ensure that foreign workers do not displace a U.S. worker or adversely affect the wages and working conditions of U.S. workers.