

## ***Immigration Compliance: Would Your Company Pass the Test?***

*by Sherry Neal, Esq.*

There's one thing H-1b employers should never forget: immigration compliance is an on-going responsibility. Read that again – slowly! Memorize it. Take heed. Compliance does not end when an H-1(b) petition is filed. Instead, it spans the entire period of an H-1(b) petition.

Recently there's been an increased emphasis on H-1b enforcement among the agencies that have responsibility over immigration matters. The Immigration and Customs Enforcement has stepped up its enforcement. Since employment is the magnet that attracts foreign nationals to the U.S., the Immigration and Customs Enforcement (ICE) has targeted employers of foreign nationals. In the past few years the enforcement has generally been directed toward companies that employ foreign nationals illegally, but this year it has expanded to include those who legally hire foreign nationals but fail to comply with all the terms of the petition. In the spring, ICE indicted a company for violations of the H-1(b) program and conspiracy based upon information contained in Labor Certification applications.

The administration has shifted its focus away from worksite raids to an emphasis on employer investigations. The Department of Homeland Security Secretary, Janet Napolitano, testified before Congress this past spring that USCIS is increasing its tactics for fraud prevention. Some of the USCIS money collected from the \$500 fraud collection fee included in H-1(b) and L-1(b) petitions is now being used by USCIS for contractors to conduct on-site visits of U.S. companies that employ H-1(b) and L-1 employees. While the USCIS contractors on site visits do not pose civil or criminal penalties, they may use the information in several ways: (1) use as information for a Request for Evidence to an employer in future petitions; (2) give the information to the Immigration and Customs Enforcement to pursue criminal or civil penalties; and (3) give the information to the Department of Labor for investigations.

But the Department of Labor is not sitting back idly waiting for USCIS to send them information. Instead, they are proactively gathering their own information on H-1b employers. Recently the U.S. Department of Labor has begun sending out questionnaires to H-1(b) foreign nationals in an effort to obtain information about H-1b companies. The questionnaire may be sent to current H-1b employees and previous H-1b employees to determine if a company is complying with the H-1(b) provisions of the Immigration and Nationality Act. The questionnaire clearly states that the foreign national is not required to respond to the questionnaire. Indeed some foreign nationals who are still employed with a company that is the subject of the questionnaire may be reluctant to respond yet others, particularly former employees, may be very willing to assist the Department of Labor in investigating the company. The Regulations provide "whistleblower protection" and to protect employees or former employees from retaliation when cooperating in an investigation regarding a company's compliance. An employer violates this regulation can face civil penalties up to \$5,000, debarment from the H-1b program for at least two years, and further administrative remedies as appropriate.

Here's a list of some of the questions the Department of Labor asks in the questionnaire along with our reminder to you about what the Department of Labor Regulations require:

- (1) **On what date did you arrive in the U.S. and on what date did you begin working for the company?**

*The Department of Labor Regulations state that the wage obligation begins when the employee enters into employment with the company but is no later than 30 days after the nonimmigrant is admitted to the U.S. pursuant to the petition.*

- (2) **If you were already in the U.S. when the petition was approved, on what date did you begin working for the company?**

*The Department of Labor Regulations state that the wage obligation begins when the employee enters into employment with the company but is no later than 60 days after the H-1b petition is approved if the foreign national is already in the United States when the petition is approved.*

- (3) **Would you have been available to begin working for the company sooner? If so, was your employment delayed and were you paid your full wages during this delay?**

*Beginning from the time the foreign national enters into employment (but no later than 30 days after being admitted pursuant to the petition or within 60 days if the foreign national is in the U.S. when the petition is approved) the company must pay the required wage for the entire period of authorized employment.*

- (4) **Were you required to sign an Employment Agreement when you began working with the company? If so, please provide a copy of it.**

*The employer cannot require a penalty for ceasing employment before an agreed date. The employer cannot seek repayment of H-1b training fee or recoupment of other business expenses and H-1b costs.*

- (5) **Were you required by the company to pay an early termination fee or required to pay "liquidated damages" for ending employment before a predetermined date?**

*The employer is not permitted to require the foreign national to pay a "penalty" for ceasing employment before the agreed upon date. "Liquidated damages" are permissible but the determination of whether something is a "penalty" or "liquidated damages" is made in accordance with state law.*

- (6) At what locations and time periods did you work for the company?**

*The employer must obtain a certified Labor Condition Application for the job, location, and the time period of work for the H-1b nonimmigrant.*

- (7) Have you ever received any deductions from your pay? If so, what were they for and what were the amounts?**

*The required wage must be paid to the employee, cash in hand, free and clear, except for “authorized deductions” which include deductions required by law (FICA, income tax), deductions required by a collective bargaining agreement or customary (health insurance, 401k, etc.), or deductions voluntarily authorized by the employee principally for the benefit of the employee and not a recoupment of the employer’s business expenses.*

- (8) Did the company charge you any of the fees associated with obtaining your H-1(b) visa such as filing fees, attorney expenses etc.? If so, how much and what was it for?**

*Employers cannot require the employee to pay any portion of the H-1b training fee, whether directly or indirectly. Also, the employer cannot impose on the employee any of the employer’s business expenses. Unauthorized deductions from wages are viewed as nonpayment of wages.*

- (9) Were you offered the same fringe benefits as other workers at the company?**

*The Department of Labor regulations require the employer to offer benefits and eligibility for benefits on the same basis and in accordance with the same criteria as the employer offers to U.S. citizens.*

- (10) Identify any periods when you were not paid by the company due to having no project, site shutdowns, holiday closures or other reasons not of your choice.**

*The Department of Labor Regulations require the employer to pay The employee for all periods of the petition, whether the employee is in “productive” status or not. “Benching” – not paying the employee during times of non-productive employment – is not permissible.*

**(11) Do you know if the company or their clients posted notice and the Labor Condition application at your worksite?**

*The employer must provide notice to the bargaining representative (if applicable). If there is no bargaining representative, the notice must be posted at the place of intended employment.*

The Department of Labor is also asking for the H-1(b) employee to provide a copy of their H-1(b) petition, Employment Agreement and any other documentation regarding the location and payment. When the government investigates your company, will your company pass the test?

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