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IMMIGRATION ALERT

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Work Force Reductions Involving H-1B Foreign Workers

By Frida P. Glucoft and Janice K. Luo

As the economic downturn continues, it is important for U.S. employers to be knowledgeable about the required actions and important issues that come up in the context of reductions in workforce, layoffs, and termination of foreign workers who are in H-1B visa status.

Mythical "Grace Periods"

Immigration practitioners are commonly asked about mythical 10-day or 30-day "grace periods," wherein many believe that the U.S. Citizenship and Immigration Services ("USCIS") allows foreign workers in H-1B work status who are terminated by their sponsoring employer to remain in the U.S. legally for a specific period of time before being required to depart. The truth of the matter is that U.S. immigration regulations do not allow for any grace period for most foreign nonimmigrant workers to leave the U.S. after employment termination. In the nonimmigrant H-1B visa context, the nonimmigrant work status is tied to a specific U.S. employer. Once the foreign worker ceases employment with that specific employer, he/she ceases to have U.S. immigration status, unless another application if filed.

Employer Obligations Specifically Pertaining to Terminated H-1B Employees

1. **Return transportation.**
   With regard to foreign workers who are in H-1B status, the immigration regulations specifically state that the sponsoring U.S. employer is liable for the "reasonable costs of return transportation" to the employee's last country of residence if the employer terminates the H-1B employee prior to the end of his/her period of authorized stay. This obligation does not extend to the H-1B employee's family members, nor does it extend to providing moving or other incidental costs for the H-1B employee to return to his/her last country of residence.

   The required payment of return transportation costs also does not apply if the H-1B employee *resigns*.

2. **Withdrawal of H-1B petition.**
   Under U.S. immigration regulations, U.S. employers of H-1B visa holders must immediately notify the USCIS of any changes in terms and conditions of an H-1B foreign worker's employment. The regulations specifically state that, "[i]f the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition."

   Recent immigration case law underscores the importance of the employers' fulfillment of the responsibility to (1) maintain clear evidence of a "bona fide" termination, such as signed termination letter from the employee and employer, clearly stating the last date of employment; and (2) notify DHS immediately upon termination or prior to termination of the H-1B employee and request withdrawal of the H-1B.

   In Mao v. Nasser Eng'g & Computing Servs., DOL ARB, No. 06-121, decided in November

2008, the Labor Department's Administration Review Board ruled that a Texas technology firm was required to pay a software developer, who was on an H-1B, more than a year of back wages because the employer failed to show that there had been a "bona fide" termination of its employment relationship with the H-1B employee under the immigration regulations enumerated above. The Board found that the employer's failure to report to the USCIS its termination of the H-1B employee's employment was the critical element proving that there was no bona fide termination of the employment relationship, which would have relieved the employer of its liability to pay the H-1B employee's full salary during the time the employee was not working.

3. **Severance Packages.**
In many instances, employers provide H-1B employees with severance packages during layoffs. Immigration policy and memoranda on the subject take the position that the receipt of pay from severance packages does not extend the legal status of foreign workers in the U.S. Instead, H-1B workers are considered out of legal status in the U.S. from the day they stop working, whether or not in receipt of a severance package.

Discrimination Issues

Section 274B of the Immigration and Nationality Act ("INA") 8 U.S.C. § 1324b prohibits discrimination based on national origin or citizenship status. The statute states that it is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual with respect to the hiring of the individual for employment or the discharging of the individual because of such individual's national origin or, in the case of a protected individual, because of such individual's citizenship status. The statute has certain exceptions.

The most important exception in the statute regarding foreign workers provides employers with the right to prefer equally qualified citizens, stating that:

> [I]t is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

In the context of discharging employees, Section 274B of the INA 8 U.S.C. § 1324b still applies, and it is considered an unfair immigration-related employment practice for a person or other entity to discriminate against any individual because of such individual's national origin or, in the case of a protected individual, because of such individual's citizenship status.

Other issues may apply to any given circumstance involving H1-B foreign workers. Employers should seek legal counsel before they act. For more information, contact Frida P. Glucoft at fpg@msk.com or Janice K. Luo at jzl@msk.com.

If you have received this alert from a colleague and would like to subscribe, kindly forward your email address to mqm@msk.com.

Frida P. Glucoft
Practice Chair
(310) 312-3151
fpg@msk.com

David S. Rugendorf
(310) 312-3118
dsr@msk.com

Howard D. Shapiro
(310) 312-3252
hds@msk.com

Janice K. Luo
(310) 312-3207
jzl@msk.com

Alexsondra Shore Fixmer
(310) 312-3231
asf@msk.com

Mitchell Silberberg & Knupp LLP

11377 W. Olympic Blvd.
Los Angeles, CA 90064

12 East 49th Street, 30th Fl.
New York, NY 10017

1818 N Street N.W., 8th Fl.
Washington, DC 20036

www.msk.com

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