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Employer Responsibility and the Labor Condition Application for Foreign Workers

Preparing for increased scrutiny and enforcement in 2009

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In today's climate of heightened workforce enforcement, employers must take measures to ensure compliance with regulations governing the employment of foreign workers. Thus far, the majority of the investigations and media attention has focused on companies and their managers who knowingly employ undocumented workers. However, the Department of Labor (DOL) has indicated it will intensify its scrutiny of each Labor Condition Application (LCA), which employers file to secure certain temporary visas for foreign workers. DOL has announced that this increased scrutiny will either commence this fall or will coincide with the January 2009 release of revamped Forms ETA 9035, ETA 9035E, and ETA 9035CP, the forms on which LCAs are submitted.

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Under the Immigration and Nationality Act (INA), an employer cannot hire a foreign worker in a specialty occupation under the H-1B, H-1B1, or E-3 classifications unless it first files an LCA with DOL. The LCA requires the employer to disclose information about the company, occupational classification, number of foreign workers sought, period of employment, work location, offered rate of pay and data used to determine prevailing wage. In addition, H-1B-dependent employers, i.e., those whose workforce consists of a certain percentage of H-1B workers, are subject to additional requirements related to recruitment and nondisplacement of U.S. workers.

When an employer submits the LCA, an authorized DOL official must certify the application before it can be filed with an H-1B petition. DOL receives approximately 420,000 LCAs each year, and 99 percent of employers now file electronically on Form ETA 9035E. In fact, since January 2006, DOL has mandated the use of the electronic LCA submission system, except in limited circumstances. Previously, DOL accepted electronic LCAs from registered and nonregistered users alike. However, as of October 1, only employers or their representatives who have registered accounts with the ETA are allowed to submit LCAs online.

A more contentious change is DOL's plans to alter the LCA process that has been running smoothly since the online LCA system began seven years ago. Currently, after the employer hits the "submit" button to file the LCA electronically, DOL issues a decision instantaneously, determining within seconds whether the LCA should be certified. This immediate certification allows an employer great flexibility in filing last-minute H-1B petitions for existing employees or new hires.

In coordination with its proposed overhaul of the LCA forms, DOL has indicated it may begin taking up to seven days to certify an LCA, and even longer in certain cases.

The current version of the LCA form sunset on November 30. DOL anticipates rolling out new forms on January 1, 2009, to coincide with the launch of the new LCA/PERM portal that will consolidate LCA and PERM labor certification filings into one online submission system.

However, this launch date is subject to change, considering that the updated forms are still in the review and approval stage. DOL published notice in the *Federal Register* on June 26, of its intent to extend and update the LCA, giving the public 60 days to comment. The comment period is now closed, and DOL is reviewing, summarizing and responding to the

comments received. The agency could make further amendments to the proposed forms before submitting them for final review to the Office of Management and Budget (OMB). OMB could suggest further changes, after which there will be one final notice published in the *Federal Register* to invite public comments.

By changing the current LCA forms, DOL seeks to promote enhanced data collection as part of its efforts to thwart what it views as improper use of the LCA system. To ensure compliance with the LCA regulations, DOL plans to increase its review of the LCA before certification. Although initial indications suggested that DOL would implement this new policy as part of the new portal implementation, DOL now reports that the heightened scrutiny could begin as early as this fall.

The regulations require the DOL to decide whether to certify an LCA within seven days after submission. In current practice, DOL usually takes about seven seconds to certify the LCA when an employer files electronically. With the increased LCA review process, certification of LCAs will take the full seven days. Furthermore, if the employer uses an alternate wage survey to document a prevailing wage determination, the review can take even longer.

This "from seven seconds to seven days" policy will effectively end the era of employers enjoying same-day turnaround on H-1B petitions. Hiring managers must coordinate recruitment of H-1B workers to avoid promising unrealistic start dates for H-1B workers. Knowing that an LCA may take seven days to be certified will allow employers to manage their own as well as the prospective employee's expectations concerning turnaround time for preparing and filing the H-1B transfer petition. Additionally, since they will have to allocate enough time for the LCA to be certified, employers must actively implement safeguards to ensure that the extension process for current H-1B employees is initiated well in advance of the H-1B expiration.

Employers must also be aware of a number of recent decisions relating to

compliance with LCA attestation requirements. By executing an LCA, the employer verifies that the information provided is true and accurate and also attests to four labor condition statements.

The employer attests that it will pay the "required wage." This means that it will pay foreign workers either the prevailing wage of the geographical region where the job is located or the employer's actual wage offered to U.S. workers for the same position, whichever wage is higher. This includes payment for certain nonproductive time and offering benefits on the same basis as they are provided to U.S. workers.

Second, the employer promises to provide working conditions that will not adversely affect similarly employed U.S. workers. Third, the employer affirms that there is no strike or lockout at the place of employment. The last attestation that the employer makes when signing the LCA is that it has notified the bargaining representative or, if none exists, the company's employees, that an LCA has been filed.

Many of the recent DOL investigations relate to the first employer attestation. The DOL Employment Standards Administration (ESA) receives complaints from aggrieved parties and investigates to determine whether an employer has failed to pay the foreign worker the required wage during the employment period. After ESA determines that a dispute exists, it initiates proceedings before an Administrative Law Judge (ALJ), who can require employers to pay back wages and can also impose civil penalties and debarment from the H-1B program for substantial or willful violations. After the ALJ renders a decision, the unsuccessful party has 30 days to appeal to the Administrative Review Board (ARB).

These cases make clear that the government will enforce an employer's obligation to pay H-1B workers the "required wage" from the moment employment commences to the time it terminates. The employer will be liable for paying back wages to the employee if it fails to pay its H-1B worker "cash wages," i.e., regular

income reflected in its payroll records as earnings disbursed to the employee and reported to the IRS with deductions.

The INA expresses no limitation on the period of back pay recovery for an H-1B worker. Therefore, the cases focus much energy on defining the appropriate period to consider in awarding back pay to an aggrieved foreign worker. The employer's responsibility to start paying the required wage begins as soon as the worker enters into the employment relationship. The regulations and the case law define that moment as when the employee first makes himself available for work or otherwise comes under the control of the employer. Reporting for orientation or training, meeting with a client, or studying for a licensing examination are examples of situations where an employee has come under the employer's control.

The employer's responsibility to pay the required wage ends solely upon the bona fide termination of the employment relationship. A succession of cases indicates that mere notice to the employee does not result in a bona fide termination that ends the employer's duty to pay the required wage. To effectuate a bona fide termination, the ARB has determined that the employer must demonstrate three elements: (1) notice to the employee; (2) notice to the Immigration Service that the employment has ended; and (3) an offer to pay the foreign worker's transportation home. Only after making this showing does the employer's obligation to pay the H-1B worker the required wage terminate.

These administrative decisions, coupled with DOL's own statements that it will be intensifying its scrutiny of the LCA process, send a clear message to employers: back wage claims by former H-1B workers are increasing, and LCA attestation requirements will be strictly construed. In view of both developments, employers must be fully aware of the obligations it undertakes when hiring a foreign worker and must take certain steps now with regard to H-1B employee recruitment and LCA compliance. ■