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AVOIDING A SNARE FOR THE UNWARY- EMPLOYER DUTIES UPON TERMINATION OF H-1B EMPLOYMENT

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ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis.

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Introduction

The H-1B visa category is the most common work-visa category for international employees working in the U.S. Thousands of H-1B employees work for large and small companies nationwide. As with any employment relationship, however, terminations occur. This article will discuss the obligations of the H-1B employer upon termination of the employment of an H-1B worker. It is crucial that these requirements be fulfilled in order to avoid a finding of phantom 'employment' obligating the employer to wage payments for work that never occurred.

Summary of the H-1B visa category

The H-1B visa category allows U.S. employers to hire foreign employees into jobs that require a university degree as a minimum entry level requirement. The H-1B category is popular for employers hiring engineers, computer professionals, accountants, teachers, and many other degreed professional employees. Each year, U.S. Citizenship and Immigration Services (USCIS), an arm of the U.S. Department of Homeland Security, is authorized to issue 85,000 new H-1B approvals. Demand for these H-1Bs far outstrips this limited quota. An H-1B employee can generally work for up to 6 years in the U.S. in H-1B status; H-1B workers who have reached certain stages of the permanent-residence process are entitled to additional H-1B time.

Only a U.S. employer can file a petition for an H-1B employee. As a general rule, employers can treat their H-1B workers the same as they treat their U.S. workers. Indeed, with regard to certain issues such as pay and benefits, the employer is required by law to treat the H-1B worker the same as U.S. workers.

However, there are certain obligations which the law imposes on an employer in the event the employer chooses to terminate the H-1B worker's employment.

What happens to the employee's immigration status if the H-1B employment is terminated?

An H-1B employee's legal status in the U.S. is contingent on working for his or her H-1B employer. As soon as that employment relationship terminates, the employee is no longer in lawful immigration status. There is no "grace period," as is commonly believed. This means that, as of the day of the termination of employment, the employee is out of status and is potentially removable from the United States.

Many employers are confused about their obligations in the event of a termination. Do they have an obligation to notify any government agencies? Do they have an obligation to ensure that the worker leaves the U.S.? What liabilities does the employer have in the event of a termination?

In general, the obligations of an H-1B employer differ depending on whether the employment is terminated by the employee (resignation) or by the employer (termination); and differ depending on whether the employment is terminated at the conclusion of the time period of the H-1B employment requested by the employer, or is terminated during the time period of the H-1B employment requested by the H-1B employer. The following comments address these situations:

1. **Termination of employment at the**

conclusion of the requested time period of H-1B employment.

With certain exceptions, each H-1B employee in the U.S. is generally eligible for up to 6 years of H-1B employment. This can be requested in increments of up to 3 years at a time. When an employer files an H-1B petition for an H-1B worker, the employer can request that the employment be approved for up to 3 years, or less if the employer wishes. An important exception is where the employee has worked in H-1B status for a prior employer. In those cases the employer must determine how much of the allowable 6 years of H-1B eligibility has been used. If the employee has less than 3 years of eligibility remaining, the employer can only ask for the remaining balance of the 6 year maximum.

If at the conclusion of the requested H-1B time period, the employer elects not to extend the H-1B employment of the employee, then the employment will naturally terminate and the employer has no further obligations to that employee under U.S. immigration law. Further, the employer has no obligation to notify the U.S. Citizenship and Immigration Services (USCIS), the U.S. Department of Labor (DOL), or any other government agency of the termination of the H-1B employment, or of the employee's whereabouts. Nor does the employer have an obligation to ensure that the employee departs the U.S., or an obligation to pay the employee's transportation expenses out of the U.S.

2. Termination of employment during the requested time period of H-1B employment.

a. Resignation by the employee

If, during the requested time period of H-B employment, the employee terminates the employment relationship, the employer again has no further obligations to the employee under U.S. immigration law. The employer must, however, notify USCIS that the employment relationship has been terminated. This can be accomplished by sending a letter to the USCIS office which approved the petition at the address printed at the bottom of the approval notice.

Otherwise, the rules are the same as termination at the end of the requested H-1B employment period.

b. Termination by the employer

- If, during the requested time period of H-1B employment, the employer terminates the employment relationship, U.S. immigration law imposes a number of obligations on the employer. These obligations are:

- The employer must provide notice of the termination to the H-1B worker.

- The employer must notify USCIS of the termination of the H-1B employment, and request revocation of the employee's H-1B petition. This can be accomplished as noted above under (a).

- The employer must offer to pay, and if accepted by the employee, pay the return transportation of the H-1B employee to the employee's last place of residence outside the U.S. The obligation to offer the return transportation extends only to the employee, not to family members or for transport of the

employee's belongings. Employers are advised to make the offer in writing, and if possible have the employee acknowledge in writing that the offer has been made. Further, employers need not simply give money to the employee for the return transportation, but instead should offer to make the travel arrangements for the employee.

Failure to take all of these steps will result in a continuation of the obligation of the employer to pay the H-1B employee the wage stated in the H-1B petition, even if the employee has departed the U.S. If even ONE of these required steps is not taken, the termination is not considered to be a "bona fide" termination for immigration purposes, and the employer's obligation to pay the H-1B wage will continue without interruption.

Although not required, employers should also seriously consider notifying DOL to revoke the Labor Condition Application (LCA) which accompanied the H-1B petition. The LCA is a document, filed by the employer with the DOL before filing the H-1B petition, by which the employer agrees (among other things) to pay the H-1B employee at least the same wage paid to similarly-employed U.S. workers in the area of intended employment. Upon termination of the H-1B employment during the requested period of employment, the employer can revoke the LCA by notifying the DOL electronically.

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