IADC COMMITTEE NEWSLETTER

EMPLOYMENT LAW

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IN THIS DOUBLE ISSUE

Taiwan has implemented new rules to provide employers and employees with flexibility regarding mandatory rest days. Companies can agree with its employees on scheduling the 8 required rest days in a four-week period, provided the agreement is approved by the labor union or labor-management conference.

Also in this issue, the Trump administration has intensified government involvement in a wide array of immigration areas that affect employers. Actions reflecting increased government scrutiny include initiations of I-9 investigations, requests for interviews of green card applicants, and denials of H-1B visas.

Featured Articles

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. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Enhanced Workhour Flexibility Under Taiwan's LSA

ABOUT THE AUTHOR

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Employers in Taiwan, may, under certain circumstances, make changes to work hours and shifts after new labour rules came into force earlier this year. The new rules aim to provide employers (and employees) greater work flexibility but have been criticized for opening Taiwan's labour market to further abuses. To prevent this, the new rules require employee approval before work hours are altered, and in some cases require approval from the governing labor authority. Below, we outline a few ways in which an employee or multiple employees at a company in Taiwan may be permitted to work more than six consecutive days.

Four Week Work Hour Adjustment System

Companies belonging to 42 industries (as designated by the Ministry of Labor) can implement a four-week work hour system which provides employees with at least two mandatory rest days every two weeks, and eight rest days in every four-week period. This means that employees can work beyond the maximum 6 days in a row so long as enough time off is provided at the beginning or end of the period of continuous work. Approval must be obtained from the labor union or labor-management conference (if no union exists) before this is implemented.

Categories of Workers Exempt From Work Hour Restrictions

Certain categories of workers may negotiate with employers to set their own work hours, rest days, national holidays and if female, night hours. Security guards, real estate agents, certain medical personnel, abattoir workers and airline crew are some examples of workers permitted to determine their

own work hours. Any changes to work hours for these employees must be reported to the local labour authority for approval.

Adjustment of the Employee's Mandatory Rest Day

Under Taiwanese labor law, a worker must be given one mandatory rest day and one flexible rest day off in every seven days (for office workers, Saturdays are likely to be flexible rest days, and Sundays are mandatory rest days). Businesses belonging to certain industries can, after meeting specific requirements and obtaining approval from the labor union or labor-management conference (if no union exists) implement changes. These changes must however be approved by the local labor authority if the business has more than 30 employees.

Employers and HR personnel should be aware of the possible options for flexibility under Taiwan's labour laws, but be mindful that in almost all cases, approval should be sought from employees before any changes are made.

2018 Immigration Roundup For Employers

ABOUT THE AUTHOR

Michael H. Gladstone has consulted employers regarding immigration planning and work authorization for almost 20 years. As an adjunct to his civil litigation work, he also practices in the immigration court protecting valuable employees from removal. He is pleased to practice with McCandlish Holton's Immigration Group, a recognized national leader in the provision of business and university immigration counseling. He can be reached at mgladstone@lawmh.com.

Since late 2017, a number of developments in immigration and work-authorization enforcement have occurred which put a fine point on the differences between the current administration and its predecessors from both parties. Present government actions manifest the current administration's determination to alter and intensify government involvement and scrutiny in immigration subject areas which heretofore were not deemed productive so far as fulfilling security and homeland security priorities. The cumulative effect of these government changes and initiatives for employers is to increase the risk of inspections and decrease employer's ability to rely upon and reliably plan for use of foreign employees, particularly professional talent served by the H1B non-immigrant visa category.

Over 5200 I-9 Investigations Initiated Against Employers in 2018

On May 14, 2018, Immigration and Customs Enforcement (ICE) announced "From Oct. 1, 2017, through May 4, HSI [Homeland Security Investigations] opened 3,510 worksite investigations; initiated 2,282 I-9 audits; and made 594 criminal and 610 administrative worksite-related arrests, respectively. In comparison, for fiscal year 2017 – running October 2016 to September 2017 – HSI opened 1,716 worksite investigations; initiated 1,360 I-9 audits; and made 139 criminal arrests and 172 administrative arrests related to worksite enforcement." https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year The increase from the 2017 fiscal year, to 2018

should be noted. In this announcement ICE referenced its successful 2017 prosecution of Asplundh, a Pennsylvania based national tree-service company, for knowing of employment of unauthorized workers, as warning to employers of the consequences of violating employment authorization rules.

As a starting point for 2018 events, the Asplundh prosecution warrants a few words. In ICE's late September, 2017, announcement it emphasized the substantial monetary penalties imposed on Asplundh, which accompanied an Asplundh guilty plea. Asplundh was required to pay $95 million in forfeiture and civil remedies. https://www.ice.gov/news/releases/asplundh-tree-experts-co-pays-largest-civil-settlement-agreement-ever-levied-ice#wcm-survey-target-id Several aspects of the Asplundh prosecution merit attention by employers in addition to the sheer size of the forfeiture judgment.

First, the prosecution culminated a multi-year investigation of Asplundh- ICE says the prosecution was based on a 6 year investigation of Asplundh. This case represents a very noteworthy, if not totally unprecedented, sustained I-9 investigation of a single company across its nationwide operations. The investigation focused on knowing unauthorized employment, a basis for criminal prosecution, not just civil fines. This is reflected in the nature of the monetary penalty- a financial forfeiture of $80 million alleged by the government to have been gained by Asplundh as a result of the knowing employment of unauthorized aliens. To build its case the government assessed the management structure of the company and charged a purposeful decentralization of hiring authority in the field which allowed senior management to deny knowledge of unlawful hiring practices occurring at the operational level. This allowed, according to the government, Asplundh to enjoy a considerable competitive advantage due to the flexibility and mobility of its unlawful workforce. Attacking the managerial structure of a national company to connect its I-9 policies to establishment of an unlawful employment advantage manifests a degree of investigative and prosecutorial sophistication not generally observed in this sphere. The message is plain - decentralized hiring practices will be used against employers, regardless whether the intent was to avoid I-9 compliance, if the result is knowing employment of unauthorized labor at the operational level.

Still invigorated by its Asplundh success, ICE announced in late July 2018, the initiation of the second phase of its 2018 initiative to prosecute unauthorized employment, issuing Notices of Inspection for I-9 audits to 5,200 businesses across the country. These audits have resulted in over 90 arrests for knowing violation of I-9 rules.

Whether or not the government will be able to sustain this level of enforcement remains to be seen. Whether the disruption and cost, however, and potential fines, or forfeitures, to a business are worth the risk of employment authorization non-compliance is settled. I-9 and hiring practice audits by outside counsel are clear choices to help ensure that if a Notice of Inspection of I-9's does arrive, the exercise will be a routine one of documenting substantial

compliance versus morphing into an Asplundh nightmare.

Interviews for Employment Based Green Card Cases

In late 2017 the government announced that it would begin interviewing employment based permanent resident applicants before issuance of their permanent residency card (green card). The announcement noted that applicants whose I-140 immigrant worker petition was filed on or after March 6, 2017, would have to be interviewed (including any family members applying with the worker) before their permanent residence may be finally decided. This change in practice affects persons approved for permanent residency based on a sponsoring employer's petition, who are already lawfully in the U.S. and wish to avoid the inconvenience of returning to their home country to visa process at a U.S. Consulate. Becoming a permanent resident under these circumstances is referred to as "adjustment of status". The new requirement for interviews of "adjustment of status" candidates and their co-applicants is newsworthy because heretofore, although such interviews are authorized by law, the government routinely waived interviews in adjustment cases because of the extremely low security risk presented by the already-immigration-vetted adjustment candidates. As noted, employment based candidates for adjustment have already been interviewed and vetted for their initial entry into the U.S., the process resulting in approval of their employer's immigrant petition for them, and the detail contained on their petition asking to adjust status. The reason given by the government for this interview requirement is protection against terrorism. Executive Order 13780.

Given the substantial number of adjustment requests made each year the added workload on USCIS personnel who must schedule and conduct the interviews (whose numbers are finite) is remarkable. Initial estimates were that an additional 12 to 18 months will be added to the former approximately 1 year process applicable to employment based adjustment of status applicants. To date, the delay predictions are coming true, with candidates first affected by the change still waiting for their interviews.

The implications for employers and their residency-candidate employees of this change in procedure are apparent. Longer processing means more and sustained uncertainty attached to the process, greater expense, and more time spent in job positions employees may have outgrown. Questioning of candidates (or co-applicants) about aspects of the employment petition case (I-140) or PERM process has been announced as fair game for beneficiaries. These are parts of the case the beneficiaries often know little about. Questioning applicants over these subjects creates opportunities for glitches causing additional delay or denial. This all requires more planning, and interview preparation for employers and applicants over a longer and more uncertain horizon than before. Authorization of counsel to accompany applicants for their interview is a genuine consideration, given the range of applicant questioning USCIS has announced, adding to the expense of sponsoring employees for permanent residency.

Brave New World for Knowledge-Based Non-Immigrants and their Employers: Denials up 40%, RFE's up by 80%, and Deference to Prior Decisions Abolished

The July, 2018, Policy brief from the National Foundation for American Policy (NFAP) documented and analyzed a development already recognized by immigration practitioners and employers utilizing the H1B visa. https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf The development is a significant increase in the number of Requests for Evidence (RFE) in connection with petitions for benefits associated with the H1B visa and a substantial increase in denials. This trend is also apparent as to other knowledge based visa categories. RFE's asking for additional evidence after an H1B petition is filed often seek wasteful and unnecessary documents substantially increasing the cost and uncertainty of hiring professional level H1B workers. RFE's are regularly cut and pasted from form banks and reflect no connection to the issues or contents of the actual petition. Requests for documents already supplied in the initial petition are legion. Denials are often contrary to law requiring expensive appeals. RFE's are up almost 70% over the same period as last year, and denials are up 41%.

Even if a petition avoids the increased likelihood of denial under the new adjudication practices, it is likely a RFE will be issued as to the petition. This increases costs and delays in adjudication besides fueling frustration and lack of confidence in the adjudication process. As a threshold, an RFE typically adds 60-90 days to the adjudication process.

The government has also announced the abolition of the deference formerly accorded to prior H1B approvals. This means that requests for extension of H1B status by the same employer for the same employee are being treated as new petitions, albeit outside the current year's cap. As a result, all such cases are now scrutinized as if the former adjudications never occurred. This has also contributed to the extreme amount of wasteful denials and RFE issuance analyzed by NFAP.

The frustration of employers and immigration counsel with years of successful H1B practice is extreme because the quality and conformity of the petitions with the applicable statutory and regulatory standards being presented has not declined. Employers know the level of detail demanded of them by their counsel to meet the strict H1B regulatory standards. The cap, alone, demands presentation of only the surest cases. What has changed is the subjective adjudication climate which manifests the unambiguous intention of discouraging use of the H1B program.

NFAP concludes: "U.S. Citizenship and Immigration Services has enacted a series of policies to make it more difficult for even the most highly educated scientists and engineers to work in the United States. USCIS no longer defers to prior determinations, approvals or findings of facts when extending a current H-1B or other high-skilled visas and has announced it will rescind work authorization for the spouses of many H-1B visa holders, revise the

definition of an H-1B specialty occupation and further limit the ability of international students to work on Optional Practical Training (OPT) after graduation, including in science, technology engineering and math (STEM) fields." Whether or not NFAP's political conclusions are accurate, we can confirm the practical effect of the current polices on H1B practice.

The broad message to employers utilizing H1B and other knowledge-based non-immigrant workers is twofold- H1B petitions will be more risky and expensive than ever for the foreseeable future. Filing at the earliest possible moment with even greater attention to detail and documentation are more important than ever. Other affected categories, e.g. L-1 for intra-company transfers, and work authorization for new graduates, will be subject to similar demands. A solution to the H1B and other knowledge based visa category problems is political, and thus, not immediately available. Any solution rests in influencing Congress to expand the H1B cap and revert to a more rational and less antagonistic approach to implementing existing rules and regulations, which, like the quality of petitions, have not changed.

Denial of Benefits may now Mean Initiation of Removal and an Appointment with the Court

On June 28, 2018, USCIS issued a Policy Memorandum concerning its policy governing the issuance of the immigration form I-862, Notice to Appear (NTA). The NTA is the document which institutes removal (deportation) proceedings. As part of its new policy, USCIS included the following as a basis for initiating removal against a foreign national: "USCIS will issue an NTA where, upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States." https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf pdf, p. 7. This is significant because unfavorable decisions resulting in a person becoming out of status- in other words, no longer lawfully present in the U.S. - have previously not resulted in immediate deportation but, instead, in instructions to the foreign national that they must voluntarily depart the U.S. or face possible referral of the matter to ICE for review concerning potential removal proceedings. If appropriate, ICE would issue the NTA to initiate removal proceedings. The new policy mandates an automatic NTA, increasing fear and uncertainty for professional-level employers and their employees.

My partner, Jennifer Minear, was interviewed by Forbes magazine concerning this development. Jennifer is currently National First Vice President of the American Immigration Lawyers Association (AILA), the preeminent organization of U.S. immigration. The interview can be found at: https://www.forbes.com/sites/stuartanderson/2018/07/11/new-uscis-policy-will-carry-harsh-consequences-for-applicants/#68c2255a4615

A few excerpts from the interview, published July 11, 2018, explain concisely the stark implications of this policy.

"A Notice to Appear is a charging document issued by the Department of Homeland Security through any of its component agencies – Immigration and Customs Enforcement (ICE), U.S. Customs and Border markProtection (CBP), or U.S. Citizenship and Immigration Services. The purpose of the Notice to Appear is to place an individual into deportation proceedings."

"Previously, if an application or petition for immigration benefits were to be denied, the foreign national might be able to depart the U.S. relatively quickly and either remain abroad or obtain approval for another visa that would enable him or her to return to the U.S. However, once an individual is issued a Notice to Appear, he or she is legally obligated to remain in the U.S. and appear before an immigration judge." So, rather than allowing a denied applicant an opportunity to depart voluntarily the new policy requires the denied applicant to remain in the U.S. awaiting a deportation hearing with no ability to work in the meantime.

The consequences of being ordered before the immigration court are serious: "For most people, being placed in proceedings is a legal limbo where you are not lawfully present, yet not able to leave without triggering a bar on re-entry, and not able to work legally."

In a follow up memo issued September 26, 2018, titled "USCIS to Begin Implementing New Policy Memorandum on Notices to Appear", USCIS back-peddled somewhat stating: "USCIS will send denial letters for status-impacting applications that ensures benefit seekers are provided adequate notice when an application for a benefit is denied. If applicants are no longer in a period of authorized stay, and do not depart the United States, USCIS may issue an NTA. USCIS will provide details on how applicants can review information regarding their period of authorized stay, check travel compliance, or validate departure from the United States." https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum

The September 26 memo does announce a significant exclusion from its announced policy: "The June 2018 NTA Policy Memo will not be implemented with respect to employment-based petitions and humanitarian applications and petitions at this time. Existing guidance for these case types will remain in effect." The intended breadth of this apparently temporary exclusion is not explained in the memorandum.

On September 27, 2018, USCIS held a teleconference concerning this policy. During the teleconference the government restated its exclusion of employment based petitions (applications on Forms I-129 and I-140) from the policy, and declared it will implement the changes "incrementally". According to the prepared statement, denied applicants will "generally" be afforded a period for appeal or motion to reconsider before issuance of an NTA. "Generally", the government stated, no NTA should issue while an appeal or motion to reconsider is pending. In contrast, USCIS it

will issue NTA's in all denied I-485 and I-539 cases (adjustments of status; status extension requests), beginning immediately regardless of the category of the underlying prior approval or visa category. In such cases no accommodation is provided for questioning of unfounded or erroneous denials.

The September 26, 2018, memorandum and September 27, teleconference statements notwithstanding, employers and employees utilizing non-immigrant visas should plan to file early, and use premium processing when available. As Jennifer advises: "Petitions for nonimmigrant (temporary) visas may be filed up to 6 months in advance of the anticipated work start date. Extensions may be filed up to 6 months in advance of the expiration date of the current petition. Employers should plan to file petitions at the earliest possible moment. When available, the petition should be filed with a request for "premium processing," which requires USCIS to take action on the petition within 15 days of filing."

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