Changes during the H-1B Relationship: Employer Compliance Issues

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The basic rules involving H-1B employment are mostly well understood. However, not every employment relationship progresses as planned from the beginning of the employment until the end without a hitch or a change. This article will focus on the hitches and the changes, both from the perspective of the employer and of the foreign national employee. The article provides examples of the types of occurrences that could alter the planned H-1B employment relationship and provides an outline highlighting the required action, if any, to be taken on the part of the employer and the foreign national.

1. Delay in Commencement of Employment

The employer must be careful in choosing the commencement date of the H-1B employment. The employer cannot commence the H-1B's employment before the start date of the labor condition application (LCA) and the H-1B petition. This includes any mandatory orientation programs for which the employee's presence is required.

Pursuant to Department of Labor (DOL) regulations ((20 CFR § 655.731(c)(6)), if the foreign national is brought from outside of the U.S., he must be put on the payroll on the earlier of the date that he presents himself for employment or 30 days after arrival in the U.S. If the foreign national is in the U.S. and a change of status has been applied for, the employment relationship may not commence until the effective date of the change of status. From that date, the employment must commence on the earlier of the date that the employee presents herself as ready for employment or 60 days after the effective date of the change of status to H-1B.

If the employee is already in H-1B status with another employer, the employment can commence as soon as the H?1B petition is filed. However, there is no requirement that an employer take advantage of H-1B portability if it does not wish to do so. Rather, at the employer's option, the employer can delay commencement of employment of the H-1B until the effective date of the H-1B approval notice, or up to 60 days later.

What if the employee is unable to obtain a social security number on a timely basis? It does not change any of the rules stated above. The employer is still responsible for commencing the H-1B's employment no later than the dates specified above irrespective of whether the employee has a social security number.

Pursuant to 26 CFR § 31.6011(b)-2(b)(1)(iii), the employment can commence upon presentation of a receipt for a social security number application; and the employer can state "applied for" where a social security number is required. Alternatively, the employer may issue a "dummy" social security number so that payroll computer systems can process paychecks.

What if there is a delay in obtaining a license? Again, this does not affect the required H-1B commencement date. In any event, this should not occur since the H-1B petition should not be approved without proof that the foreign national has obtained all necessary licenses.

What if the foreign national is delayed in obtaining a visa overseas? If the delay occurs before commencement of employment, the rule stated above regarding the necessity of employment within 30 days of arrival in the U.S. applies. If the delay occurs after the employee travels during the middle of his employment, no action is required since rules regarding H-1B compliance only apply during periods that the H-1B is in the U.S.

2. Change in Hours of Employment

Assuming an H-1B petition is filed for full-time employment, the employee can work as many hours as the employer wishes. Changes in hours or schedules do not require any action on the part of the employer unless hours fall below full-time (generally defined as at least 35 hours per week). In that event, a separate part-time labor condition application and H-1B petition would be required.

3. Change in Job Duties

An insignificant change in job duties does not trigger a requirement of any immigration filing. On the other hand, a "material" change in job duties does require a new H-1B petition. The definition of "material" is not susceptible to exact definition. However, the author believes that the best definition is whether the change in job duties places the position in a different prevailing wage category.

4. Change of Wage

The employer must pay the H-1B the higher of prevailing wage and actual wage. “Actual wage” is defined as the wage paid by the same employer “to all other individuals with similar experience and qualifications for the specific employment in question.” 20 CFR 655.731(a)(l). What if, during the approved H-1B period, the employer reduces wages paid to its employees below the level originally stated in the H-1B petition? The answer depends upon whether the reduced wage is above or below the “required wage,” which is the higher of actual or prevailing wage. If wages of all employees are reduced, and even after the reduction the wage is above prevailing wage, no action is required.

5. Change of Location of Employment

The H-1B approval is location-specific. Two examples of change of location of employment serve to highlight the issues of regulatory compliance. One example involves the H-1B being transferred to a geographical area not anticipated in the original labor condition application/H-1B petition filing. If the location of the transfer is in the same “area of intended employment” (roughly defined as normal commuting distance), only a new posting at the new location is required. If the employment will take place at a location outside of the area of intended employment and will be for more than 30 days in a year, a new labor condition application and H-1B petition is required. 20 CFR § 655.735. The 30 day period is increased to 60 days if the H-1B continues to maintain an office at her permanent worksite, spends a substantial amount of time at the permanent worksite and the H-1B’s residence or place of abode is located in the area of the permanent worksite. 20 CFR § 655.735 (c).

What if an office closes or a supervisor transfers to a new location and the employee must transfer? If this results in a new employer, the discussion in No. 7 below should be consulted. If it is the same employer at a different location, the rules stated in the previous paragraph apply.

6. Change of Employer

If, as in the example above, the H-1B transfers in mid-employment to a different employer, the new employer must file a new H-1B petition. The definition of a new employer generally tracks the taxpayer employer identification number -- if it is different, it is a new employer and a new H-1B is required. However, if the change of employer is the result of a corporate reorganization, merger, acquisition or the like, no new H-1B petition is required. Rather, it is sufficient for the new employer to assume the LCA liabilities of the previous employer and for the new employer to update the public examination file with various information required by the DOL regulations. 20 CFR § 655.730(e) and § 655.736(d)(6).

7. Discipline or Suspension

As a result of disciplinary reasons, malpractice reasons, issues of sexual harassment or the like, an employer may deem it appropriate to remove an H-1B from the payroll for a period of time. What are the ramifications and regulatory issues? The DOL position is that the employer who removes an employee from payroll for work-related reasons (i.e., other than because of a condition related to the employee as in the leave of absence scenario discussed below) is in violation of DOL’s regulations and subject to sanctions, including a back pay award. The DOL position, which could be subject to challenge in that it puts the foreign national employee in a better position than a U.S. citizen employee, would require the employer to terminate the H-1B petition if at any point the employer decides not to pay the required salary. See 20 CFR § 655.731(c)(7)(i).

8. Leave of Absence

Leaves of absence may be based on maternity, FMLA, extended sick leave, employer-imposed rehabilitation or simply the employee’s personal needs. The regulatory issues depend completely upon whether the leave is at the instance of the employer or of the employee. Also, DOL and USCIS have different concerns and requirements.

If the leave is employee-requested, such as maternity, there are no requirements placed upon the employer. However, if the leave is employer-generated, the rules set forth above under Discipline or Suspension would apply; and the employer would be required to pay full salary during the leave period. This requirement is imposed by DOL. 20 CFR § 655.731(c)(7).

USCIS policy, which is not stated in any regulation, is not dependent upon whether the leave is employer or employee-initiated. Rather, the issue of whether the employee maintains H-1B status during the leave is dependent upon whether there is an expectation of continuing employment at the conclusion of the leave of

absence. If there is -- even if the leave is extended -- the employee is in valid status. If there is no expectation of continuing employment, the employee is not in valid status during the leave period. USCIS policy places no time limit on the length of the leave; however, both the employee and the employer should be aware that time continues running toward the six-year limit on H-1B status, even though the employee is on leave, unless the employee changes to a different nonimmigrant status for the duration of the leave and then changes status back to H-1B at the end of it.

9. Resignation or Termination

Performance or behavior issues lead to an employee's termination; an employee's contract is rescinded due to visa delay or denial; an employee voluntarily resigns. What needs to be done, and what are the ramifications?

Again, there are different issues involving the two different government agencies -- DOL and USCIS. With respect to DOL, it is advisable -- although not required -- to notify DOL to terminate the labor condition application (LCA). The reason is that the employer's liability under the LCA continues for a period of one year after the earlier of the end date of the LCA or the termination of the LCA. 20 CFR § 655.760(c).

The USCIS regulation suggests that an employer "shall" notify USCIS when the H-1B employment relationship ends, whether by termination or resignation. 8 CFR § 214.2(h)(11)(i)(A). However, there is no sanction for failure to notify USCIS. As a result, depending upon the circumstances of the termination or resignation, the employer may wish at least to delay termination of the LCA and notification to USCIS in order to enable the employee to have a new employer file a new H-1B petition before his or her status expires. Revocation of the petition can preclude the employee's eligibility for H-1B portability with the new employer. Furthermore, once the H?1B petition is revoked, USCIS may issue a notice that the employee is out of status. Although the employee is technically out of status immediately after the employment relationship ends, as a practical matter, especially if the petition is not revoked, a new H-1B petition filed by a new employer within 30 days or less after the employment relationship terminates is often approved for the employee's H-1B extension of status. If the employee finds a new position at a later date, it is likely that an extension of status would not be granted. In that case, the new employer's H-1B petition could be approved; but the employee would have to leave the country and apply for a new H-1B visa to return to the U.S. Depending upon the alien's nationality, this could be a minor inconvenience or a major delay in visa issuance.

These considerations may be reconsidered following a September 2006 decision by the DOL Administrative Review Board holding that the employer is obligated to pay salary until the employer notifies USCIS of the H-1B employee's termination. The prudent employer may be less prone to delay notification knowing the DOL position.

Finally, upon termination prior to the expiration date of the H-1B status, the employer is required to pay the employee's return costs of transportation to her home country. 8 CFR § 214.2(h)(4)(iii)(E). However, if the employee chooses not the leave the country, there is no such obligation. Neither DOL nor USCIS has jurisdiction to enforce this obligation.

As is readily obvious from the above analysis, any variance from the planned schedule of an H-1B's employment can generate complicated legal and regulatory compliance issues. The author hopes that the analysis contained in this article will assist in avoiding the mine fields and determining when action must be taken to protect the interests of the employer and the H-1B employee.