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IMMIGRATION CORNER

Beware of H-1B wage rule violations

by Michael P. Stafford

The U.S. Department of Labor (DOL) continues to prosecute employers that violate the laws on wage payments to H-1B workers. In a recent case, the DOL's Administrative Review Board (ARB) upheld an administrative law judge's (ALJ) decision awarding fines against an employer that failed to pay employees when no work was available. If you employ H-1B workers, you must be aware of — and scrupulously follow — the wage payment rules.

H-1B wage requirements

H-1B visas are issued for "specialty occupations" and allow an employee to work temporarily for a U.S. employer in a qualifying position. Employers of H-1B workers must adhere to stringent wage requirements. You must pay H-1B employees the higher of the actual wage paid to employees in the position *or* the prevailing wage paid for the job in the geographic area of intended employment. You also must pay them for certain periods of nonproductive time.

If an H-1B worker isn't performing work and is in a nonproductive status because of a decision by the employer — *e.g.*, no assigned work or a lack of a permit or license — you must continue to pay the employee the required wage listed on the original H-1B petition materials. Your failure to do so in that type of situation is colloquially referred to as "benching." H-1B employees, however, don't need to be paid if their nonproductive status is caused by conditions unrelated to their employment, such as a voluntary request for leave for family or personal reasons, temporary incapacity for health reasons, or a discharge.

Benching violations continue to be aggressively prosecuted

On June 30, 2005, the ARB upheld the ALJ's decision imposing fines for willful violations of the H-1B wage requirements. Pegasus Consulting Group, Inc., a management consulting company that employed foreign workers to provide software that automated its customers' business operations, laid off a number of H-1B workers after experiencing a loss of business. The company, however, didn't notify the U.S. Citizenship and Immigration Services (USCIS) that the employees had been laid off, and several were later reemployed after business picked up again.

Several employees filed complaints with the DOL's Wage and Hour Division, which began an investigation. Pegasus argued that the workers were "on leave without pay" before "resuming active employment."

The ALJ had no difficulty concluding that the layoffs weren't bona fide discharges within the meaning of the H-1B regulations. Pegasus hadn't notified the USCIS of the workers' "terminations" and didn't obtain new H-1B status for them once they resumed employment. Therefore, the judge concluded that the company was trying to avoid its obligation to pay H-1B workers for nonproductive time and awarded $231,279.41 in unpaid back wages to the employees.

Under the circumstances of the case, Pegasus should have discharged the H-1B workers, notified the USCIS, and paid for the workers' return to their countries of origin. Only then would the company have been relieved of its legal obligation to pay the required wages.

The ALJ also found that Pegasus was guilty of a "willful" violation of the H-1B wage requirements. Thus, the DOL upheld an additional civil penalty of $40,000 on top of the wages the company was required to pay the employees for nonproductive time.

Bottom line

The DOL continues to prosecute H-1B wage-related violations aggressively. When you're making layoffs, you should pay careful attention to the special wage rules applicable to H-1B employees to avoid any potential liability for benching.