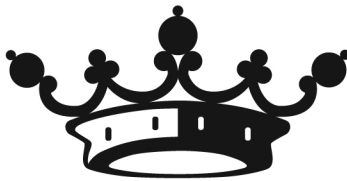


I N S I D E T H E M I N D S

New Developments in Immigration Enforcement and Compliance

*Leading Lawyers on Analyzing Recent Enforcement
Trends, Collaborating with Government Agencies,
and Developing Compliance Programs*



ASPATORE

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Trends in Worksite
Enforcement Laws and
Employer Compliance
Best Practices

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ASPATORE

Introduction

Due to the events of September 11, 2001 and the subsequent reorganization of the U.S. government agencies responsible for the implementation of U.S. immigration laws, U.S. employers of foreign personnel have witnessed a transformation in the means by which the U.S. government enforces such laws. Visits by government agencies to employer worksites have become commonplace. They may be unannounced or they may be on notice, depending on the government agency and the circumstances surrounding the visit. Either way, employers need to understand which agencies may conduct a site visit, the purpose of the visit and, above all, be well prepared for an investigation of their compliance with numerous immigration laws and regulations. This article will highlight recent trends and cases in worksite enforcement and identify best practices for employers to meet their compliance obligations, which can result in both criminal and civil penalties.

Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) was established in March 2003. With a 2010 budget of \$5.7 billion and a workforce of more than 20,000 in 400 offices in the U.S. and overseas, ICE is the largest investigative arm of the Department of Homeland Security.¹ ICE's Office of Investigations is responsible for investigating a range of issues affecting national security including worksite enforcement of immigration laws.² This includes investigations of egregious violations of immigration statutes by employers as well as auditing employer Employment Eligibility Verification (Form I-9) obligations.

There have been three distinct trends in the enforcement of immigration worksite compliance obligations by ICE: an increase in the number of Form I-9 audits, an enforcement strategy focused on employers, and the use of criminal statutes to prosecute employers and their representatives. As a result, employers need to understand the scope of their worksite responsibilities and to take their compliance obligations seriously.

¹ See www.ice.gov/doclib/pi/news/factsheets/2010budgetfactsheet.doc

² See www.ice.gov/pi/worksite/index.htm

As part of its new enforcement initiatives, ICE has stepped up the number of its Form I-9 audits. On November 19, 2009, ICE issued a news release announcing the issuance of Notices of Inspection (NOIs) across the country to 1,000 employers to compel the production of their Forms I-9 and to audit their hiring and business records.³ This number surpassed the delivery of NOIs to 652 businesses on July 1, 2009, which had exceeded the number of NOIs issued for all of fiscal year (FY) 2008. Furthermore, the news release provided the following statistics regarding the number of NOIs issued since April 30, 2009:

- Forty-five businesses and forty-seven individuals have been debarred from government contracting.
- 142 Notices of Intent to Fine (NIF) issued imposing fines totaling \$15,865,181.
- Forty-five Final Orders issued imposing fines of \$798,179 (*compared to eight Final Orders totaling \$196,523 for the same period of FY 2008*)
- 1,897 cases initiated (*compared to 605 cases initiated during the same period of FY 2008*).
- 1,069 Form I-9 inspections (*compared to 503 Form I-9 inspections for all of FY 2008*).

ICE enforcement strategies are focused on employers. On April 30, 2009, ICE issued a Worksite Enforcement Fact Sheet⁴ and a Memorandum Enforcement Strategy,⁵ which revealed its new priorities. The resulting enforcement guidelines require ICE officers to focus their enforcement resources on employers who “knowingly” hire illegal aliens and to “obtain indictments, criminal arrests, or search warrants or commitment from a U.S. Attorney’s Office to prosecute and target employers *before* arresting employees for civil immigration violations at a worksite.”⁶ (Emphasis added.)

The use of Form I-9 “forensic” audits has also become an important administrative tool in building criminal charges against employers and their representatives. Historically, the legacy Immigration and Naturalization Service (INS) enforced employer compliance with the Immigration Reform

³ See www.ice.gov/pi/nr/0911/091119washingtondc2.htm

⁴ See www.ice.gov/pi/news/factsheets/worksite.htm

⁵ See www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf

⁶ Id.

and Control Act of November 7, 1986 (IRCA) by means of conducting on-site Form I-9 inspections and imposing civil fines. The trend toward the use of criminal sanctions was best expressed in an ICE announcement in June 2007 in which it described the practices of legacy INS in the following way: “These fines were assessed under an outdated structure, were subject to substantial legal wrangling, and ended being nothing more than a slap on the wrist.”⁷

Recent ICE Enforcement Cases Involving Criminal Prosecutions

ICE criminal investigations can commence in a variety of ways. Local ICE agents may receive an anonymous tip or complaint that a company is engaged in illegal activity⁸ or they may receive information about a company’s non-compliance in the course of an audit of a government contract.⁹ The re-hiring of employees who had previously been terminated due to an earlier ICE investigation of a company¹⁰ and the irregular use of social security numbers in payroll practices¹¹ are also actions that may result in an investigation. Once an investigation is commenced, agents may interview former employees, review all of the company’s Forms I-9, and/or review any available Social Security Administration No-Match letters.¹² In some cases, investigators will wire informants to tape conversations held with the target of the investigation.¹³

Investigations can culminate in an enforcement action, whereby ICE agents enter the company’s facilities and arrest unauthorized workers found on the worksite, and/or prosecute the company and its managers for immigration violations.¹⁴ The investigative process may take months,¹⁵ or even years,¹⁶ to complete.

⁷ See www.ice.gov/doclib/pi/news/testimonies/070626KCStarOpEd.pdf

⁸ See e.g., *United States v. Leise*, No. 1:08-mj-010 (S.D.Iowa April 3, 2008) (criminal complaint).

⁹ See e.g., *United States v. Melvin Kay*, No.3:06-cr-02606 (filed S.D. Cal. 2006)

¹⁰ See www.ice.gov/pi/nr/0908/090818seattle.htm.

¹¹ See www.ice.gov/pi/nr/0812/081219albany.htm.

¹² www.ice.gov/pi/nr/0908/090807houston.htm

¹³ Associated Press, *Wal-Mart says it was helping with immigration probe*, USA Today, Dec. 12, 2003, www.usatoday.com/money/industries/retail/2003-12-19-walmart_x.htm.

¹⁴ www.ice.gov/pi/nr/0809/080905houston.htm

¹⁵ www.ice.gov/pi/nr/0809/080905houston.htm

¹⁶ www.ice.gov/pi/news/newsreleases/articles/070828cincinnati.htm.

The most common grounds for bringing criminal charges is 8 U.S.C. §1324, which prohibits the bringing in and harboring of aliens. This statute includes encouraging or inducing an alien to “come to, enter, or reside in the U.S. knowing or in reckless disregard of the fact that such coming to, entry, residence is or will be in violation of the law.”¹⁷ A number of companies or managers have pled guilty to violating this section of the code.¹⁸ In support of its enforcement activities, the government has also used the following criminal statutes: 18 U.S.C. § 371 (conspiracy to defraud the United States);¹⁹ 18 U.S.C. §1546 (the fraud and misuse of visas or permits);²⁰ 18 U.S.C. §2 (the aiding and abetting of the commission of a crime);²¹ 18 U.S.C. §1956 (money laundering);²² and 18 U.S.C. §1001 (allowing employees to make materially false statements on their Forms I-9.)²³ Notably, the Racketeer Influenced & Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, has not been successfully used by the government, although it is the basis of one current class action, brought by a group of employees legally authorized to work against an employer.²⁴

Penalties for violations can range from fines, to probation, to the forfeiture of assets. In some cases, a company may pay a general settlement amount to the government in order to end a federal investigation into its immigration

¹⁷ 8 U.S.C. §1324 (a)(1)(A)(iv)

¹⁸ See *Kay*, No.3:06-cr-02606-btm-1(S.D.Ca. Dec. 14, 2006) (plea agreement); www.justice.gov/usao/ias/press_releases/2009/081709.html; *Leise*, No. 1:08-mj-010(filed S.D. Iowa April 2, 2008)(docket report) (pled guilty to the lesser charge of reckless disregard in the hiring of undocumented aliens); *United States v. Taylor*, No.6:09-cr-03060-jce (W.D. Miss. Sept. 14, 2009) (plea agreement) *United States v. Shipley Do-Nut Flour and Supply Co. Inc.*, No. 4:08-cr-00576 (S.D. Tex. Aug. 27, 2008) (plea agreement) *United States v. Yamato Engine specialists 1990 Ltd.*, No. 2:09-cr-00274-jlr(W.D. Wash. Sept. 21, 2009)(plea agreement).

¹⁹ *United States v. Tyson Foods. Inc* No.4:01-cr-00061 (E.D. Tenn filed Dec. 11, 2001); *U.S. Truszkowski*, No.05-CR-0454 (N.D.Ill.filed May 20, 2005).

²⁰ *Tyson Foods Inc.*, No.4:01-cr-00061

²¹ *Id.* (charges were dismissed); *Yamato*, No. 2:09-cr-00274-jlr (W.D.Wash. Aug. 18, 2009) (plea agreements of Shafique Dhanani and Shiring Dhanani Makalai).

²² *Truszkowski*, No. 05-cr-0454 (pled guilty to the charges)

²³ *Yamato*, No. 2:09-cr-00274-jlr (W.D.Wash. Aug. 18, 2009)(plea agreements of Shafique Amirali Dhanani and Shiring Dhanani Makalai)

²⁴ *Williams v. Mohawk Indus. Inc.*, 314 F.Supp.2d 1333, 1339-40 (N.D.Ga. 2004), *aff'd*, 411 F.3d 1252, 1266 (11th Cir. 2005) (affirming district court’s denial of employer’s motion to dismiss the RICO charges)

violations.²⁵ A feature of settlements and plea agreements can be the condition that the employer institutes a compliance mechanism to ensure future compliance with immigration laws, including the use of the government's E-Verify program.²⁶

Most recently, in 2009, there has been a shift in ICE's enforcement strategy to deter unlawful employment. The prosecution of employers and companies has been prioritized over the opportunity to arrest unauthorized workers for immigration violations.²⁷ For example, in February 2009, ICE conducted a raid of Yamato Engine Specialists and arrested approximately twenty-eight unauthorized aliens. Almost immediately, Janet Napolitano, the Homeland Security Secretary, publicly questioned the appropriateness of such an action, stating that enforcement actions should be focused on employers' hiring practices.²⁸ Subsequently, many of the individuals detained during the Yamato raid were released and the federal investigation into the company continued, resulting in plea agreements with Yamato and two of its managers.²⁹

Furthermore, in July 2009, ICE informed American Apparel Inc. that approximately 1,800 of its employees were potentially unauthorized to work.³⁰ After giving the employees a reasonable amount of time to produce documents supporting their authorization to work, the company fired the individuals who were unable to prove their employment

²⁵ Lauren Coleman-Lochner, *Wal-Mart Settles Illegal Immigration Case for \$11 Million*, March 18, 2005, Bloomberg.com, www.bloomberg.com/apps/news?pid=10000103&sid=apCyBG8gQ_iA&refer=news_index.

²⁶ See www.ice.gov/pi/nr/0812/081219albany.htm; *United States v. Taylor*, No. 09-03060-01-cr-s-jce (W.D. Miss. Sept. 14, 2009) (attachment A to plea agreement describing implementation of compliance program).

²⁷ See www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf.

²⁸ Lornet Turnbull, *Napolitano demands review of ICE raid at Bellingham plant*, The Seattle Times, Feb. 26, 2009, http://seattletimes.nwsources.com/html/localnews/2008787533_raid26m.html.

²⁹ See John Stark, *Yamato workers freed as immigration probe continued into Bellingham company*, The Bellingham Herald, Mar. 31, 2009, www.bellinghamherald.com/2009/03/31/851694/yamato-workers-freed-as-immigration.html; *Yamato*, No. 2:09-cr-00274-jlr (W.D. Wash. Aug. 18, 2009).

³⁰ Miriam Jordan, *American Apparel Sets Layoffs Tied to Probe*, The Wall Street Journal, Sept. 4, 2009, <http://online.wsj.com/article/SB125201213087984483.html>.

eligibility.³¹ While no government action has been taken against the individual employees, American Apparel could be subject to penalties for hiring unauthorized workers.

While this move away from mass arrests of undocumented workers may be consistent with the Obama Administration's stated commitment to provide relief as part of comprehensive immigration reform,³² employers should not consider this trend in any way to be a diminution of its efforts to enforce immigration worksite laws, particularly those relating to Form I-9 compliance.

Preparedness for a Form I-9 Audit

ICE NOI's are sent either in person or by certified mail and typically provide for three days notice to surrender the employer's Forms I-9 and copies of attached documents that were presented at the time of the Form I-9 completion. The surrender can occur at ICE offices or at the company's worksite. In addition, the inspections notice and the supplemental instructions often request the submission of other business and employee documentation including the following:

- Employee roster or payroll report listing all persons employed in the prior year containing the following information:
 - Full employee name (first name, middle initial, last name);
 - Social Security number;
 - Date of birth; and
 - Date of hire and date of termination (if applicable).
- Monthly Payroll Reports for the prior year with wage detail by employee.
- Copies of the four most recent State Unemployment Insurance Quarterly Tax Reports.

³¹ *American Apparel Announces Developments Regarding Inspection by U.S. Immigration and Customs Enforcement*, July 1, 2009,
<http://investors.americanapparel.net/releasedetail.cfm?ReleaseID=393357>.

³² www.whitehouse.gov/issues/immigration

- Copies of the Quarterly Tax Statements (IRS Form 941) pertaining to all employees for the prior year.
- Independent contractor roster listing the dates of hire and termination (if applicable) for all independent contractors hired for the prior year.
- Copies of Tax Form 1099 filed for all independent contractors in the prior two years.
- A current listing of all paid on-call individuals employed on a sporadic, irregular, or intermittent basis and not deemed to be an employee.
- Copies of any SSA Employer Correction Request received for the prior year.
- Copies of any U.S. Citizenship and Immigration Services (USCIS) I-129 or I-140 petitions and Department of Labor (DOL) ETA-9089 labor certification applications submitted or received for the prior year.
- Copies of articles of incorporation, business license, and most recent annual report.
- Employer Identification Number (EIN) and Taxpayer Identification Number (TIN) documentation.
- If available, copy of company procedures or policies regarding Form I-9 preparation.
- Information on the following:
 - Whether the company participates in the E-Verify program;
 - Whether the company previously received a Form I-9 inspection;
 - Whether the company obtains employees from a temporary staffing agency and, if so, the names of the temporary staffing agencies used for the prior year.

Although employers may be able to negotiate an additional period of time to surrender these documents, employers should consider their preparedness to provide such documentation in a timely manner prior to receipt of an NOI.

Best Practices for Form I-9 Compliance

The Form I-9 is a one-page document, but its completion is a complex process. Employers can face liability for fines and penalties for errors and omissions on the form, or for failure to properly retain the form. As noted, the failure to maintain a compliant Form I-9 program can result in investigations leading to criminal prosecution.

On November 19, 2009, ICE issued a Form I-9 Inspection Overview³³ listing the possible fines for Form I-9 errors and omissions, as well as for knowingly hiring or continuing to employ aliens who are not authorized to work. When technical or procedural violations are found pursuant to INA §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)), an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. The fine schedule contains an Enhancement Matrix used by ICE to enhance or mitigate fines based on the following factors: business size, good faith, seriousness, the number of unauthorized aliens, and history of compliance. The fines can range from \$110 to \$1,100 per violation.

Use of an Electronic Form I-9 System

To help with Form I-9 compliance, many employers are now turning away from a manual to an electronic Form I-9 process. These provide employers with benefits such as the ability to complete forms with electronic signatures from any location 24/7, and other features such as prompts that alert users to forms completed improperly and deadline trackers.

³³ See www.ice.gov/doclib/foia/dro_policy_memos/formi9inspectionoverview.pdf

Manual Form I-9 Programs

For companies that continue to complete and maintain Forms I-9 on a manual basis, the following summarizes some best practices:

- Develop a written policy regarding the completion, maintenance, and purging of Forms I-9 and follow it.
- Maintain Forms I-9 in a separate location from personnel files.
- Provide Form I-9 instructions to each employee at the time of Form I-9 completion.
- Never specify which documents an employee should provide to establish identity or work eligibility.
- Determine whether to retain copies of supporting documentation and do so consistently.
- Appoint specialists or other designated personnel to take responsibility for the Form I-9 program and do not rely on only one individual without oversight.
- Create a re-verification calendar system to follow up and re-verify Forms I-9 with time limited work authorization documents.
- Provide appropriate training to dedicated personnel on Form I-9 completion protocols and types of acceptable supporting documents.
- Conduct regular audits of Forms I-9.
- Purge Forms I-9 consistent with legal retention requirements (one year from termination or three years from the date of hire, whichever is longer).

In addition to the above, employers should ensure that their contractors who supply labor through contract are in compliance with immigration laws. This can include a representation in the contractor agreement that the contractor performs Form I-9 employee verification, is in compliance with IRCA, and agrees to indemnify the employer for any penalties or liabilities assessed against the employer for contractor violations.

United States Citizenship and Immigration Services

In February 2006, U.S. Citizenship and Immigration Services (USCIS) created the National Security and Records Verification Directorate (NSRV) to enhance U.S. national security and the integrity of its immigration system. NSRV includes three divisions: the Fraud Detection and National Security Division (FDNS), the Records Division, and the Verification Division.

FDNS is responsible for identifying and combating fraud associated with immigration applications and petitions. Details regarding its mission and structure are set forth in the September 12, 2006 USCIS Fact Sheet.³⁴ FDNS consists of approximately 650 immigration officers, intelligence research specialists, and analysts located in field offices throughout the United States, and it has contracted with numerous private investigation firms to conduct site visits. Its budget is funded in part by the “fraud fee” employers pay at the time of filing an H-1B or L-1 visa petition.

There are three types of site visits that FDNS may conduct:

- Risk Assessment Program. This entails a random selection and study of petitions and applications to design profiles of potential fraud.
- Targeted site visits. These visits consist of a visit to employer worksites to make inquiries where fraud is suspected.
- Administrative site visits. These primarily relate to nonimmigrant visa petitions for religious workers (R petitions), intracompany transferees (L petitions) and specialty occupation workers (H-1B petitions), and to permanent resident visa petitions for multinational executives and managers.

Employers should be aware that FDNS administrative site visits are carried out without any notice and are unannounced. FDNS takes the view that a subpoena is not necessary to engage in a site visit pertaining to an immigration petition. In the instructions to Form I-129, the USCIS

³⁴ See www.uscis.gov/files/pressrelease/NatlSecurity091206FS.pdf

states its authority for compliance review and monitoring may include but are not limited to: “review of public records and information, contact via written correspondence, the Internet, facsimile, or telephone; *unannounced physical site inspections of residences and places of employment; and interviews.*” (Emphasis added.)

The current focus of FDNS is to visit the worksites of H-1B visa holders. The USCIS Vermont Service Center has recently indicated to the American Immigration Lawyers Association that it has transferred approximately 20,000 cases to the FDNS as part of the H-1B assessment program. These visits to worksites of H-1B visa holders are typically performed on a post adjudication basis and are randomly selected. They are conducted with a set of specific questions for the company representative and for the foreign national and are designed to verify that the employer is bona fide, that the employment correlates with the H-1B petition, and that the employee is working in accordance with the terms and condition of the petition. In addition, investigators often ask to review certain documentation such as a copy of the H-1B visa petition, the employee’s pay records, and the company’s financial information.

Employer Best Practices for FDNS Site Visits

Employer best practices to prepare for and handle a site visit include the following:

- Alert the company’s receptionist to the possibility of a site visit and establish procedures for notifying a company representative.
- Designate a company representative or compliance officer who will meet with the FDNS investigator.
- Advise all foreign national employees that FDNS conducts site visits and that they may be questioned at any time by FDNS during their employment with the company.
- Provide a copy of the visa petition and supporting documents to the beneficiary relating to the job opportunity and its terms and conditions to ensure his/her familiarity with their content.

- Advise all non-immigrants to notify the company representative if there should be any changes in the terms and conditions of their employment, including physical location of employment, so that amended petitions may be submitted to USCIS as required.
- Create a system to routinely verify that there have been no changes in the terms and conditions of employment, including physical location.
- Maintain copies of visa petitions in a central location for ease of access.
- Request the name, title, and contact information of the investigator, including a business card.
- Obtain confirmation from a toll-free number on the card for confirmation of the investigator's credentials.
- Ask counsel to be present for the site visit, if possible.
- Provide a private room for the investigator.
- If counsel is unable to attend, ensure that a witness is in attendance. Notes of the meeting should be made by both persons in attendance and submitted to counsel labeled "privileged and confidential."
- Respond to questions posed by the investigator. If answers to some of the questions are not known, advise the investigator that the answers will be provided once the information has been obtained. Decline to respond to questions that are unrelated to the petition.
- Generally cooperate with the investigator.

Wage and Hour Division of the U.S. Department of Labor

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) was created with the enactment of the Fair Labor Standards Act of 1938.³⁵ Its mission is to promote and achieve compliance with labor standards and it is responsible for the administration and enforcement of a wide range of laws, including various provisions of the Immigration and Nationality Act (INA), which extend protections to different types of nonimmigrant workers.

³⁵ See www.dol.gov/whd/about/history/whdhist.htm

Section 212(n) of the INA authorizes the DOL to assume responsibility for ensuring that H-1B workers receive the wages specified in the Labor Condition Application (LCA) the employer obtained from DOL in support of its H-1B visa petitions for the sponsored foreign national and to ensure that the sponsored employee is working in the occupation and location specified in the LCA. The DOL's Employment and Training Administration is required to maintain a list of all employers and occupational classifications of all filed LCAs including the wage rate, the number of foreign professionals sought, and the period of intended employment. This list is available for public examination at the Department of Labor, 200 Constitution Avenue, NW, Room N-4456, Washington, DC 20210.

Compliance with LCA and Public Access Folder Requirements

The employment of H-1B and other nonimmigrant workers³⁶ requires sponsoring employers to obtain certified LCAs attesting that:

- It is offering and will pay, during the period of authorized employment, wages that are at least the equivalent of actual wages paid to similarly situated employees or the prevailing wage, whichever is higher.
- It will provide working conditions for the nonimmigrant that will not adversely affect working conditions of similarly employed workers.
- There is no strike or lockout in the occupational classification at the worksite.
- Notice of the filing of the LCA has been provided to the employees' bargaining representative or has been physically posted in a conspicuous place at the worksite or by electronic means³⁷.

In addition, employers must make certified LCAs available for public examination at the employer's principal place of business in the United States or at the foreign national employee's worksite within one working

³⁶ The LCA and Public Access Folder requirements for H-1B workers also apply to E-3 and H-1B1 workers. See: 20 CFR §§ 655.730 (c)(5) and 655.760.

³⁷ See 20 CFR §§ 655.731 through 655.734.

day after the LCA is filed with DOL.³⁸ The LCA must be maintained in a Public Access Folder and must include the following:³⁹

- A copy of the certified LCA (Form ETA 9035 or Form ETA 9035E) and cover pages (Form ETA 9035CP).
- Documentation that specifies the wage rate to be paid the H-1B nonimmigrant.
- A full, clear explanation of the system that the employer used to set the “actual wage” the employer has paid or will pay workers in the occupation for which the H-1B nonimmigrant is sought, including any periodic increases in the rate of pay. This may be accomplished by including a memorandum summarizing the wage system or a copy of the employer’s pay system or scale (payroll records are not required, although they shall be made available to the WHD in an enforcement action).
- A copy of the documentation the employer used to establish the “prevailing wage” for the occupation for which the H-1B nonimmigrant worker is sought. A general description of the source and methodology is all that is required for public examination; the underlying individual wage data relied upon to determine the prevailing wage is not a public record, although it shall be made available to the Department in an enforcement action.
- A copy of the documentation establishing that the employer has satisfied the union/employee notification requirements.⁴⁰
- A summary of the benefits offered to U.S. workers in the same occupational classifications as the nonimmigrant workers, a statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits and/or, where applicable, a statement that some/all H-1B non-immigrants are receiving “home country” benefits.⁴¹
- Where the employer undergoes a change in corporate structure, a sworn statement by a responsible official of the new employing

³⁸ 20 CFR § 655.760 (a)

³⁹ 20 CFR § 655.760 (a) (1) through (10)

⁴⁰ 20 CFR §655.734

⁴¹ 20 CFR §655.731(c)(3);

entity that it accepts all obligations, liabilities, and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity.⁴²

- Where the employer utilizes the definition of “single employer” in the Internal Revenue Code, a list of any entities included as part of the single employer in making the determination as to its H-1B-dependency status.⁴³
- Where the employer is H-1B-dependent and/or has been found to be a willful violator, and indicates on the LCA(s) that only “exempt” H-1B non-immigrants will be employed, a list of such “exempt” H-1B non-immigrants.⁴⁴
- Where the employer is H-1B dependent and/or has been found to be a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers (or copies of pertinent documents showing this information).⁴⁵

Employers are required to retain PAF records for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the LCA or, if no nonimmigrants were employed pursuant to the LCA, one year from the date the labor condition application expired or was withdrawn.⁴⁶ In addition, required payroll records for the H-1B employees and other employees in the occupational classification must be retained at the employer’s principal place of business in the United States or at the place of employment for a period of three years from the date(s) of the creation of the record(s), except that if an enforcement action is commenced, all payroll records must be retained until the enforcement proceeding is completed.⁴⁷

⁴² 20 CFR §655.730(e)(1))

⁴³ An H-1B dependent employer is, generally, one whose H-1B workers comprise 15 percent or more of the employer's total workforce. Different thresholds apply to smaller employers. H-1B dependent employers who wish to hire only H-1B workers who are paid at least \$60,000 per year, or have a Master’s degree or higher in a specialty related to the employment, can be exempted from these additional rules. See: 20 CFR § 655.736 (d)(7)

⁴⁴ 20 CFR §655.760(a)(9)

⁴⁵ 20 CFR §655.739(i)(4)

⁴⁶ 20 CFR §655.760 (c)

⁴⁷ Id.

WHD Audit Triggers

WHD investigations can be initiated because of four circumstances,⁴⁸ as follows:

- A complaint from an aggrieved person or organization.
- Credible information from a reliable source that the employer has failed to meet certain LCA conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple employees.
- The Secretary of Labor has found, on a case-by-case basis, that an employer within the last five years has committed a willful failure to meet a condition specified in the LCA.
- The Secretary of Labor has reasonable cause to believe that the employer is not in compliance.

The majority of WHD investigations are triggered by complaints from aggrieved parties. Such persons complete Form WH4 and submit them to the WHD office that has jurisdiction over the physical location of the employer.

Recent Trends in WHD Enforcement

Complaints to WHD from aggrieved persons are often filed by H-1B workers who have had work hours reduced, have been placed in nonproductive status, or have had their employment terminated. The downturn in the economy has resulted in an escalation of such complaints. In these cases, WHD's attention is focused primarily on the employer's satisfaction of its LCA wage obligation, although its investigation will also include a full review of the content of the PAF and its adequacy.

The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B worker.⁴⁹ By signing and filing the LCA,

⁴⁸ See INA §212(n)(2)(F) and (G); and 20 CFR §§ 655.806 through 655.808.

⁴⁹ 20 CFR §§ 655.731, 732

the employer attests that for the “entire period of authorized employment, the required wage rate will be paid to the H-1B nonimmigrant.”⁵⁰ Penalties for non-compliance can include back pay liability, civil monetary penalties for LCA violations including anti-benching provisions aimed against placing employees in non-productive status without pay, and potential debarment from sponsoring immigration petitions.⁵¹

Employer exposure to liability for back wages can arise at the commencement of employment, during employment, and after the employment has been terminated.

Commencement of Employment

DOL regulations require employers to commence paying the H-1B employee’s LCA required wage rate on the date that the H-1B worker “makes him/herself available for work or otherwise comes under the control of the employer.”⁵² This includes “waiting for an assignment, reporting for orientation, or training...or studying for a licensing exam.”⁵³ If the employee fails to make him or herself available for work or fails to come under the employer’s control, the employer must pay the H-1B worker at the LCA required wage rate on the thirty-first day following his or her admission to the United States.⁵⁴ If the H-1B worker is already in the United States and is seeking a change of status, the employer has to commence paying the required wage sixty days from the validity date of the approved petition or the date the change of status is granted, whichever is later.⁵⁵ If the employee fails to make him or herself available for work or come under the employer’s control within the above time periods, the employer should withdraw the petition or be exposed to back wage liability.

⁵⁰ 20 CFR § 655.731 (a).

⁵¹ 20 CFR § 655.810

⁵² 20 CFR §731 (c) (6) (i).

⁵³ Id.

⁵⁴ 20 CFR §655.731 (c) (6) (ii).

⁵⁵ Id.

Reduced Work Hours during Authorized H-1B Employment

In the LCA, an employer agrees to pay the required wage rate on either a full-time or a part-time basis. The precise hours per week are listed by the employer in the I-129 petition. Most importantly, the obligation to continue to make such payments continues even though the H-1B worker is not performing work or is in a nonproductive status (e.g., the lack of assigned work or the required license).⁵⁶ For part-time employment, the employer must pay a nonproductive employee for at least the number of hours indicated on the I-129 petition.

An employer's obligation to pay the required wage in the LCA is relieved in situations where the H-1B worker experiences a period of nonproductive status due to conditions unrelated to employment.⁵⁷ This includes situations where the employee requests time away from his or her duties such as touring the United States or caring for an ill relative or where the worker becomes incapacitated.

Accordingly, in situations where an employer seeks to reduce an H-1B worker's hours, the employer should obtain a new certified LCA specifying that the position is part time, and stating the rate of pay and the prevailing wage on an hourly basis. In addition, it should file an amended I-129 petition to reflect the part-time employment and the hourly (and not annual) wage.

Termination of H-1B Employment

The employer's obligation to pay the LCA wage obligation continues until there is a "*bona fide* termination of the employment relationship."⁵⁸ The question as to what constitutes a "*bona fide* termination of the employment relationship" has been the subject of much debate and recent case law.

INA requires that the H-1B employer offer the required LCA wage rate "during the period of authorized employment."⁵⁹ The obligation is

⁵⁶ 20 CFR §655.731 (c) (7) (i)

⁵⁷ 20 CFR §655.731 (c) (7)(ii).

⁵⁸ *Id.*

⁵⁹ INA § 212(n) (1) (A) (i)

reiterated in USCIS regulations which state that the H-1B petitioner must submit, as part of the petition, “a statement that it will comply with the terms of the labor condition application for the duration of the alien’s authorized period of stay.”⁶⁰ It is USCIS’s long-held view that an alien’s period of authorized stay expires when an employment relationship ceases to exist.⁶¹ The alien becomes subject to removal upon a failure to maintain status.⁶²

Furthermore, the existence of an ongoing employment relationship presumes an employer’s right to control an employee. USCIS regulations define an “*employer*” as a “person, firm, corporation, contractor, or other association or organization in the United States which (a) engages a person to work within the United States and (b) has an employer-employee relationship with respect to employees as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.”⁶³ In addition, the DOL defines “*employer*” as a “person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B non-immigrants and/or U.S. worker(s).” It further defines “*employed, employed by the employer, or employment relationship*” as the “employment relationship is determined under the common law, under which the key determinant is the putative employer’s right to control the means and manner in which the work is performed.”⁶⁴ In sum, the regulations suggest that an H-1B employment relationship no longer exists if, because of a termination of employment, an employer no longer exercises control of his or her work.

However, the end of a period of authorized employment or the termination of an employment relationship is not conclusive of an end to an employer’s LCA wage obligation. In the preamble to the Interim Final Rule

⁶⁰ 8 CFR § 214.2(h)(4)(iii) (B)(2)

⁶¹ See Letter of Thomas W. Simmons, INS Branch and Trade Chief, to Harry J. Joe, Esq. *reprinted in 76 No.9 Interpreter Releases 378* (March 8, 1999); see also Letter of Efrén Hernandez, Acting Director INS Business and Trade Services to Bernard Walsdorf, *reprinted in 77 No.8 Interpreter releases 243* (February 8, 2000); see also Letter of Efrén Hernandez, director, INS Trade and Business Services to Wendi S.Lazar, Esq. *reprinted in 78 No. 13 Interpreter releases 608* (April 2, 2001).

⁶² INA § 237 (a)(1)(C)(i)

⁶³ 8 C.F.R. §214.2(h)(4)(ii)

⁶⁴ 20 CFR §655.715

implementing the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), DOL noted that it “would not likely consider it to be a bona fide termination ...unless INS has been notified that the relationship has been terminated pursuant to 8 CFR 214.2 (h)(11) (i)(A) and the petition cancelled and the employee has been provided with payment for the transportation home where required by 214(E)(5)(A) of the Immigration and Nationality Act and INS regulations at 8 CFR 214.2 (h)(4)(iii)(E).”⁶⁵

The DOL Administrative Review Board (ARB) had previously held that a “*bona fide* termination of the employment relationship” does not turn solely on whether the employer notified USCIS.⁶⁶ This holding was consistent with the Department of Labor’s Field Operations Handbook, which indicates that a determination of a *bona fide* termination is to be based on all of the circumstances or evidence.⁶⁷ More recently, in the case of *Amtel Group of Florida Inc. v. Rungvichit Yongmahapakorn*, ARB No.04-087, ALJ No. 2044-LCA006 (ARB Sept. 29, 2006), the ARB articulated a stricter interpretation on the necessity to provide notice of the termination of employment to USCIS and to pay return transportation costs to the terminated H-1B worker. In this case, the complainant was notified that her employment had been terminated, but the employer had not notified USCIS of the termination or paid her return transportation costs. The ARB held that even though the complainant had been told her employment was terminated, Amtel had not effected a “*bona fide* termination” because USCIS was not notified of the termination of the employment relationship and the H-1B employee had not been paid the costs of return transportation.

In view of this holding, the best evidence of termination of employment is a letter from the employer to USCIS notifying USCIS of the termination and requesting a withdrawal of a petition. To ensure that there is no ambiguity, the best practice is to send the letter to USCIS “immediately” upon termination of employment.⁶⁸ In addition, the employer should also

⁶⁵ 65 Fed. Reg. 80171 (Dec. 20, 2000)

⁶⁶ *Administrator, Wage & Hour Div. v. Ken Technologies Inc.*, 03-140 (ARB 11/30/04)

⁶⁷ Department of Labor Field Operations Handbook, Chapter 71 Page 71d07-2

⁶⁸ 8 CFR § 214.2(h)(11)(i)(A)

provide written notice of termination to the employee and pay the return transportation costs, if required.⁶⁹

Conclusion

U.S. employers are now faced with increased pressure to ensure that they understand the scope of immigration laws and implement compliance programs and policies that meet those challenges. The days of filing a visa petition or completing a Form I-9 with an impression that such documentation will never be reviewed by government worksite investigators have gone. Indeed, employers should anticipate a government audit and consider such action to be a normal part of the process. Lawyers have an enhanced opportunity to take a special advisory role in counseling employers to inculcate a new sense of awareness and a culture to help them prepare for and pass a government investigation.

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Mr. Maltby has authored numerous articles relating to U.S. employment-based immigration law and regularly lectures in the field of immigration law to professional organizations and trade groups. He has served as an adjunct professor of law at Pace University School of Law, and currently serves as chairman of the British American Chamber of Commerce Foundation Inc. and on the board of directors of British American Business Inc. He is a member of the American Immigration Lawyers Association and has been ranked as follows: U.S. News/Best Lawyers Law Firm rankings - Immigration Law; New York Magazine Best Lawyers - Immigration

⁶⁹ 8 CFR § 214.2(h)(4)(iii)(E). This obligation is not required if the employee voluntarily terminates his/her employment.

Law; American Lawyer Best Lawyers; International Who's Who of Corporate Immigration Lawyers 2010; and recommended as "Leaders in their Field" for Chambers USA 2010.

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