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Recruiting Foreign Workers in the United States— How to Remain Competitive and Ensure Compliance in a Climate of Increased Government Scrutiny

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The authors' intent is to provide U.S. HR departments and in-house counsel with an overview of the recent trends and events in government oversight of worksite enforcement and scrutiny of U.S. visa programs; to highlight "best practices" that every organization should consider implementing; and to provide an update on several changes to U.S. immigration laws that benefit U.S. employers recruiting foreign nationals that may have gone unnoticed during the economic downturn.

In response to the recent recession and high levels of unemployment in the United States, government authorities have sought to protect U.S. workers by increasing their scrutiny of employers' compliance with U.S. immigration laws. Whether it is with respect to maintaining a legal workforce, or in the arena of employment-based visa programs, one thing is clear: there is an increased focus on employers' compliance with U.S. immigration laws. As such, it is essential for HR teams to be well informed regarding the legal implications of hiring, maintaining, and terminating foreign workers in the United States.

As the economy turns around, and hiring trends increase, U.S. employers will continue to use U.S. visa programs to remain globally competitive and fill critical highly specialized positions. In that vein, several changes on the employment-based visa front present "good news" and add flexibility for U.S. employers.

Maintaining a Legal Workforce: the New Focus on Enforcement of Employment Eligibility Verification (EEV) Obligations

The Obama Administration has made it known that it will focus its efforts on employers' compliance with employment eligibility verification (EEV) requirements as an entry point to investigations of employers that may be violating U.S. laws relating to maintaining a legal workforce. Whereas, during the prior administration, raids by U.S. Immigration and Customs Enforcement (ICE)—the enforcement arm of the U.S. Department of Homeland Security (DHS)—focused on detaining and removing individual undocumented workers, in addition to sanctioning employers, the new strategy seeks to take a more humane approach with respect to individuals while increasing civil and criminal enforcement of immigration-related employment laws with respect to employers and imposing tougher employer sanctions. Any comprehensive immigration reform that may be enacted is likely to keep employers at the forefront of a solution that ensures that only those legally authorized will be able to be employed in the United States.

Since July 2009, in furtherance of the DHS' renewed focus on targeting employers who break U.S. laws and knowingly hire illegal workers, ICE issued over 1,600 Notices of Inspection (NOIs) to businesses nationwide alerting them that ICE would be auditing their EEVs (Form I-9). This number represents a threefold increase of the 503 similar notices ICE issued throughout fiscal year 2008. Moreover, in March 2010, an additional 180 NOIs were issued to businesses in Louisiana, Mississippi, Alabama, Arkansas, and Tennessee. Specifically, the audits include a comprehensive review of the companies' Form I-9 to determine whether the businesses are complying with employment eligibility verification laws and regulations.

Since 1986, all employers have been required by law to complete and retain a Form I-9 for each employee. The purpose of Form I-9 is to document that each employee is authorized to work in the United States. In reviewing such documentation, it is the employer's responsibility to review original employment authorization documents presented by the employee and certify under penalty of perjury that the documents reasonably appear to be genuine and relate to the individual.

The audits performed by ICE may result in civil penalties for substantive violations for knowingly hiring or continuing to employ individuals who are not authorized to work in the United States. There also are penalties for substantive technical violations relating to errors in the preparation of Form I-9, known as "paperwork violations." ICE considers several factors in determining penalty amounts, including the size of the business, the business' good faith effort to comply, the seriousness of the violation, whether the violation involved unauthorized workers, and the business' history of prior violations. Of even greater concern is ICE's use of the Form I-9 audit as an entry point to initiate criminal investigations of employers. According to John Morton, DHS' assistant secretary for ICE, ICE has identified Form I-9 audits as the most important administrative tool in building criminal cases and bringing employers into compliance with the law.

Participation in E-Verify

E-Verify quickly is becoming the government's standard for employers to demonstrate a commitment to comply with U.S. immigration laws relating to maintaining a legal workforce. Formerly known as the "Basic Pilot Program," E-Verify is the government's Internet-based program that allows employers to electronically verify the employment eligibility of employees, regardless of citizenship, by checking information contained in databases maintained by DHS and the Social Security Administration. As of May 5, 2010, more than 200,000 employers have enrolled in E-Verify, with more than 8.7 million queries run through the system in fiscal year 2009 and more than 8.8 million queries run through the system so far in fiscal year 2010. Although the use of E-Verify remains voluntary for most employers, several states such as Arizona, Mississippi, and South Carolina have passed legislation making its use mandatory for all employers.

On September 8, 2009, federal contractors and subcontractors became required to begin using the

E-Verify system. The Federal Acquisition Regulation (FAR) Council's rule requires federal contractors and subcontractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States. The three-year extension of E-Verify, which extends the program through the end of September 2012, was included in the $42.8 billion appropriations bill for DHS, which President Obama signed into law on October 28, 2009. ICE has made it clear that it would like to see E-Verify made into a national standard for all employers. Thus, many predict that in the near future, the use of E-Verify will be required for all businesses operating in the United States.

Enforcement Relating to the Use of U.S. Employment-based Visa Programs

Fueled by a government study that uncovered fraud and technical violations in the H-1B visa program, federal officials have delivered on their promises of more rigorous compliance and enforcement efforts against non-compliant employers. For additional proof that employers are on the front-line in the enforcement of U.S. immigration laws, look no further than the revamping of the role of the U.S. Citizenship and Immigration Services' (USCIS) Office of Fraud Detection and National Security (FDNS).

Created in 2004, FDNS was formed to enhance the quality, integrity, and security of the U.S. legal immigration system. In 2009, in furtherance of its mission and the Administration's focus on targeting employers who violate U.S. immigration laws, FDNS commenced an assessment of the H-1B visa program. The H-1B visa classification is for temporary employment of foreign professionals in specialty occupations, including, but not limited to, information technology professionals, business analysts, financial managers, engineers, architects, and allied health care professionals such as physical therapists, as well as fashion models. FDNS' compliance review methods include review of public records and information, contact with employers via written correspondence or electronic transmission or telephone, and unannounced physical site inspections at the H-1B employer's principal place of business and/or at the H-1B nonimmigrant's work location. It has been reported that USCIS' Vermont Service Center has transferred approximately 20,000 H-1B cases to the FDNS as part of the H-1B assessment program and it has been speculated that an additional similar number of H-1B petitions have been forwarded by USCIS' California Service Center for such an assessment.

In addition, in response to a letter sent to USCIS by U.S. Senator Charles Grassley (R-IA) on September 29, 2009, inquiring about aspects of the H-1B visa program and USCIS' efforts to combat fraud in the program, USCIS announced that, among other measures, it plans to expand its Administrative Site Visit and Verification Program (ASVVP), which is carried out by the USCIS'

Best Practices–Minimizing Risk and Maintaining a Legal Workforce

In light of DHS' renewed focus, and in order to reduce unauthorized employment, employers should consider implementing "best practices" to minimize their risk and maintain a legal workforce. Such "best practices" include:

- use of E-Verify to verify the employment eligibility of all new hires;
- establish a written hiring and employment eligibility verification policy;
- institute an internal compliance and training program related to the hiring and employment verification process, including completion of Form I-9 and how to use E-Verify;
- allow the Form I-9 and E-Verify process to be conducted only by individuals who have received appropriate training;
- require that an annual Form I-9 audit be conducted by an outside source or, if within the company, by persons not directly involved in the EEV process;
- establish and maintain safeguards against the use of the employment verification process for unlawful discrimination; and
- if applicable, establish a protocol for assessing the adherence of "best practices" guidelines by the company's contractors/subcontractors.

FDNS. USCIS commenced operation of ASVVP in July 2009 to determine whether the location of employment actually exists, if the beneficiary is employed at the location specified and is performing the duties as described and is being paid the salary as identified in the H-1B petition. Initially, USCIS has been focusing the ASVVP on post-adjudication H-1B site inspections. Information relating to non-compliance with H-1B program requirements could lead to revocation of a previously approved petition and/or referral to ICE for further investigation, which could lead to additional sanctions. As a result of FDNS' ongoing assessment of the H-1B program, employers should review their H-1B program compliance policies and procedures.

Furthermore, USCIS intends to access independent, open-source commercial sources to obtain information relevant to its adjudicatory process. For example, on September 30, 2009, USCIS announced that it had awarded a contract to Dunn and Bradstreet to act as an independent information provider for its new program, the Verification Initiative for Business Enterprises (VIBE). The VIBE program is an Internet-based service that uses commercially available data to verify information submitted by companies and organizations that petition to employ foreign workers. Although the date of implementation of VIBE is still unknown, on May 27, 2010, USCIS' Office of Public Engagement held an information sharing session, which included a presentation of the VIBE program. Previously, it was anticipated that VIBE would have been implemented by the spring of 2010.

Enforcement of H-1B Obligations

Another area where it is essential for HR departments and in-house counsel to review current practices is with respect to compliance with regulatory obligations set out by USCIS and the U.S. Department of Labor (DOL) in the H-1B visa program. DOL regulations establish certain standards to protect similarly employed U.S. workers from being adversely affected by the employment of the H-1B workers, as well as to protect the H-1B workers. Moreover, both DOL and USCIS rules regulate terminations of H-1B employees.

A prerequisite to obtaining the services of an H-1B worker is the filing of a Labor Condition Application (LCA) with the DOL. On filing any LCA, the company attests that it has met and will continue to meet certain requirements that are designed to protect the jobs and working conditions of U.S. workers throughout the period that an H-1B worker is employed. To support its attestations, the company develops and updates required supporting documentation for public access and government inspection. Pursuant to the regulations, the employer must make the filed LCA and necessary supporting documentation available for public examination at the employer's principal place of business in the United States or at the place of employment within one working day after the date the LCA is filed with DOL. Inspection requests may include those made by a disgruntled former employee or the business' biggest competitor. If the business does not have the required documentation available for public inspection, the company may be subject to penalties and even debarment from future sponsorship of H-1B workers.

An additional rule of which many employers may not be cognizant is the DOL-issued regulation that provides that certain expenses directly related to the filing of the LCA and the H-1B petition are "business expenses" of the employer that may not be paid by the H-1B worker if the payment of these costs would reduce the H-1B worker's wage below the "required wage." The required wage rate is the higher of the employer's actual wage for the specific employment and the prevailing wage. The reasoning behind this regulation is that if the H-1B worker is required to pay the expenses for the H-1B petition and accompanying LCA, this would cause a reduction of the wage paid to the worker, which would result in the wages being below those of other U.S. workers in the same occupation with substantially similar education and experience in violation of LCA regulations.

Once the H-1B petition is approved by USCIS and the H-1B worker "enters into employment" with the employer, which occurs when the H-1B worker first makes him- or herself available for work or otherwise comes under the control of the H-1B employer, the H-1B employer is obligated to pay the H-1B worker the required wage rate for the occupation listed on the H-1B worker's LCA. The DOL has promulgated regulations that provide detailed guidance regarding the determination, payment, and docu-

mentation of the required wages.

However, as referenced above, many employers still are affected by the recent recession in the United States and still are experiencing a lack of work and projects assignable to H-1B workers, requiring the H-1B employer to place the foreign worker in nonproductive status. Placing an H-1B worker in nonproductive status because of lack of work is prohibited. "Benching" is the term used for temporarily laying off an H-1B worker or putting the H-1B worker on nonproductive status without pay or with reduced pay during periods of no work.

"Benching" is an employer's failure to pay the H-1B employee his or her full rate of pay based on the employer's lack of work, during periods between contracts, or after a downturn in business. In these situations, DOL regulations require the H-1B employer to pay the H-1B worker his or her full rate of pay as stated on the H-1B visa petition. An exception to this rule is when the H-1B worker voluntarily requests a period of nonproductive status for reasons unrelated to employment, such as to tour the United States or to care for an ill family member. H-1B employers still remain obligated to comply with the H-1B employer's benefits plan or any other statute relating to employment such as the Family and Medical Leave Act or the Americans with Disabilities Act.

Terminations of H-1B workers are another area of which employers should take note. Unless an employer effectuates a "bona fide termination of employment," the employer may remain liable for H-1B wages well beyond the employee's last day of employment. USCIS regulations provide that an H-1B employer who terminates an H-1B worker before the end of his or her authorized period of stay is required to notify USCIS of the termination, thus triggering revocation of the employer's H-1B petition.

To effectuate a "bona fide termination," the H-1B employer also must offer the H-1B worker the "reasonable costs" of return transportation abroad, generally interpreted as his or her last country of residence or home country. Thus, U.S. employers of H-1B workers should be aware of their obligation to pay the required wages to their H-1B workers, and that this obligation does not cease until there is a "bona fide termination" of H-1B employment. Although outside the scope of this article, it must be noted that other visa classifications also may require certain steps be taken by the employer when terminating a foreign worker.

Remaining Competitive Through Recruitment

Emerging from the recent recession, U.S. businesses understand that to remain competitive in today's global marketplace, they must hire and keep the most talented employees. Often, the best candidates for these positions are foreign nationals. As briefly described below, a prudent and carefully devised strategy that considers available categories of work authorization and employment-based visas will enable U.S. companies to reap the benefits of skilled foreign labor, by remaining competitive while minimizing the risks. Because of the lapse in hiring that occurred

Best Practices–Complying With H1-B Program Regulations

"Best practices" in support of employers' good faith efforts to comply with USCIS and DOL H-1B visa program regulations include:

- reviewing approved and pending H-1B petitions to ensure that all the information provided to USCIS is current and correct;
- creating and maintaining strict procedures to follow in the event of an onsite inspection by FDNS;
- reviewing the LCA public access file and other documents that must be made available for both public and government inspection to ensure they are up to date and complete and that the employer is fulfilling all attestations made in the LCA;
- developing a company policy with respect to H-1B petition preparation and LCA file maintenance;
- implementing annual LCA Compliance Review Audits by an outside source to ensure compliance with DOL obligations; and
- instituting an internal compliance and training program related to establishing and maintaining compliance with LCA requirements.

during the recent recession, there have been several changes that provide flexibility to U.S. employers wishing to hire foreign nationals that may not have been on employers' radars.

Foreign students (F-1). There still is some confusion for many employers regarding the 2008 changes relating to employment of foreign students. On April 8, 2008, DHS published an Interim Final Rule that established two new provisions that apply to all F-1 students eligible for post-completion Optional Practical Training (OPT). OPT is training that is directly related to an F-1 student's major area of study. It is intended to provide a student with practical experience in his or her field of study during or on completion of a degree program. Among other provisions, the DHS rule extends the period in which a student may apply for post-completion OPT to 60 days after the student's program end date. Students with an approved 17-month extension will receive a total of 120 days of unemployment time during the entire period of post-completion OPT. Students eligible to receive a 17-month extension must be an F-1 student who has completed a bachelor's, master's, or doctoral degree in science, technology, engineering, or math, (STEM) and must have a job or job offer from an E-Verify employer.

In addition, certain provisions of the rule also apply to F-1 students who are the beneficiaries of an H-1B petition and who (because of the cap on the number of H-1B petitions accepted in a given year) cannot begin employment until the beginning of the fiscal year following the fiscal year in which the H-1B petition was filed. Before this rulemaking, the F-1 status for these students often expired before their H-1B status began—a period known as the "cap gap." Through this provision of the rule, DHS automatically extends the F-1 status and for students on post-completion OPT, the employment authorization for students formerly subject to the cap gap.

Specialty occupations (H-1B). Unlike many other visa classifications, the H-1B classification is subject to annual quotas. For individuals who hold a baccalaureate degree or the equivalent, the annual quota is 65,000 a year, with 6,800 reserved for nationals of Chile and Singapore. There are an additional 20,000 visas for individuals with master's degrees from an U.S. educational institution.

In the years immediately proceeding the recession, H-1Bs were at a premium. USCIS typically ran out of baccalaureate-level H-1B numbers under the quota close to the outset of the application period, which commences April 1, of each fiscal year in anticipation of October 1, start dates. However, in 2009, H-1B numbers remained available until December 2009. In 2010, H-1B usage has continued to be slower than in the pre-recession years as well.

As of the time of the writing of this article, according to USCIS' most recent update, USCIS had received approximately 23,500 cap-eligible petitions and 10,000 petitions for foreign workers with advanced degrees for fiscal year 2011. USCIS will continue to accept H-1B petitions until the annual quota is reached. Thus, employers that still have a need for new H-1B workers for fiscal year 2011 commencing October 1, 2010 should consult with immigration counsel as soon as possible to take advantage of the H-1B numbers while they are still available, and to carefully analyze those circumstances in which cap exemptions might be claimed. For example, requests for extensions of stay for current H-1B workers, amendments to H-1B petitions requesting a change in the terms of employment for current H-1B workers and change of employer petitions for individuals already in H-1B status do not count toward the cap. In addition, petitions for new H-1B employment are not subject to the annual cap if the foreign professional will be employed at an institution of higher education or a qualifying related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization.

Trade-NAFTA (TN). Trade-NAFTA (TN) status is for professional workers from Canada or Mexico. The TN category is similar to the H-1B in the sense that it generally covers a wide range of job categories. These include accountant, computer system analyst, architect, graphic designer, medical/allied professionals, among many others.

A change that may not have been on employers' radars as a result of lessened hiring because of the recession was the 2008 change in the maximum period of time a TN professional worker may remain in the United States before seeking readmission or obtaining an extension of stay. As a result of this change,

eligible Canadian and Mexican TN nonimmigrants are now allowed initial admission and extensions of stay in increments of up to three years instead of the prior maximum period of stay of one year.

A Deeper Understanding

As a result of the renewed focus placed by DHS on worksite enforcement of immigration issues, it is essential that employers' HR teams and in-house counsel deepen their understanding of their obligations under both federal and state laws. In addition, businesses need to ensure that they are informed regarding their obligations under U.S. visa programs, such as the H-1B program, so that they do not inadvertently take employment actions that violate U.S. immigration laws. Adopting "best practices," implementing internal compliance policies, and instituting annual training relating to U.S. immigration requirements are essential to remaining competitive and ensuring compliance in the current climate of increased government scrutiny.

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