It's A Tough Economy – Don't Violate Immigration Laws When Making Tough Decisions

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As our economy enters a period of slow growth, and maybe even the 'R' word, employers may look to cut costs to ride out the economic downturn. These costs could include reductions in workforce, pay, or hours worked by company employees. If a company currently has foreign employees, the decision must look beyond basic company economics and consider possible violations of immigration laws as well. So what potential immigration laws could a company violate under these circumstances?

<u>Labor Condition Application Violations</u>

Under the H-1B and E-3 professional visa programs, employers are required to pay their foreign employees the higher of the actual wage or prevailing wage for the position. The prevailing wage is determined by the Department of Labor (DOL). These obligations are covered under the Labor Condition Application (LCA) that is filed by employers with the DOL prior to obtaining professional work status for foreign employees. The LCA governs what the employer must pay and the hours the employee must work under the H-1B and E-3 programs.

Employers should be mindful that reducing pay or work hours of foreign employees could result in a violation of the employer's obligations under the LCA. Make sure that the salary does not fall below the actual wage stated in the LCA for the foreign employee. That will result in a violation of the LCA, and could lead to DOL penalties. Reducing an employee's status from full-time to part-time is possible, but an employer must first do two things: 1) make sure that they are paying the higher of the actual or prevailing wage for that part-time position and 2) file an amended H-1B/E-3 application that contains a new LCA evidencing the part-time status of the employee. Furthermore, the DOL does not recognize 'nonproductive work status', also referred to as 'benching'. Employers will be required to make pro-rata payment of required wages even if a foreign worker is put on nonproductive work status.

What happens if an employer terminates an H-1B or E-3 professional workers? An employer must pay for the reasonable costs of transportation for the employee back to his/her home country for H-1B workers. This means the cost of a plane ticket back home. The obligation covers the H-1B employee and not the employee's family. The same legal obligation does not exist for workers holding E-3 status.

Some employers will be considered 'H1B dependent' if a certain percentage of their workforce consists of H-1B workers. If an employer is H-1B dependent, it must monitor layoffs within its workforce. After an LCA is certified for a position, an employer must make certain that it has not laid off a U.S. worker from an equivalent position within 90 days preceding and 90 days after the filing of an H-1B petition. Employers must be careful to monitor layoffs of U.S. workers under these conditions.

<u>PERM Labor Certification Violations</u>

The PERM labor certification application is the first step of most employer-sponsored permanent residency applications filed on behalf of foreign employees. The purpose of PERM is to prevent the displacement of qualified U.S. workers for the foreign employee's position. Layoffs of U.S. workers in positions similar to the foreign worker, if they occur within the six-month period preceding the filing of a PERM labor certification, will impact an employer's recruitment obligations and their ability to file the labor certification application. In this situation, employers will be required to consider the U.S. workers who have been laid off for the position specified in the labor certification. Therefore, it is important that employers monitor layoffs not only in the context of workers in H-1B or E-3 status, but for workers who are going through the permanent residency process as well.

Is it a tough economy? Yes. Will tough decisions need to be made? Perhaps. But be careful not to violate immigration laws while implementing cost cutting measures.

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