DOL Clarifies When an Employer’s LCA Wage Obligations Cease to Terminated Workers Who Obtain Subsequent Approved H-1B Employment

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On December 22, 2014, the U.S. Department of Labor’s (DOL) Administrative Review Board (ARB) issued an important Final Order and Decision clarifying precisely when an H-1B employer’s Labor Condition Application (LCA) back pay obligations to a laid-off employee cease under the Immigration and Nationality Act (INA).

The issue decided in the case, which involved a prominent financial institution, was whether a subsequent employer’s approved H-1B petition filed on behalf of an individual who had been terminated effectively ended the obligation of the initial H-1B employer to pay back wages pursuant to a certified LCA because the subsequent approved petition itself establishes a bona fide termination of the employee. Notably, the ARB held that in cases involving multiple H-1B petitioners where the termination was clear to the former employee, the approved “new employment” or “change of employer” petition filed by a subsequent employer ended the wage obligations of the initial H-1B employer at the time the new petition was approved by U.S. Citizenship and Immigration Services (USCIS).

To ensure that employment of foreign workers does not adversely affect the U.S. workforce, H-1B employers are required to obtain a certified LCA from the DOL. In doing so, an H-1B employer attests that it will pay the professional foreign worker the higher of the prevailing wage or the actual wage paid to comparably employed U.S. workers in the same occupation and geographic area of employment. Generally speaking, for the duration of the approved H-1B employment, unless an employer takes steps to file a new LCA and materially amend the H-1B petition, the wage obligation is intended to guarantee payment for the entire period of employment authorized by the LCA, up to three years. Additionally, under the H-1B regulations an employer’s wage obligations to a nonproductive (i.e., laid-off) employee are designed to continue for the complete period of authorized employment, unless certain conditions are met to establish that a bona fide termination of the foreign national’s employment has occurred. These express statutory conditions include clearly informing the worker facing termination of employment, paying the costs of a return trip home, and notifying USCIS that the employer is terminating the employment of the H-1B beneficiary.

Furthermore, stringent reading of an earlier ARB case held that even though an employer acts in good faith making it abundantly clear that it is terminating an H-1B employee, unless it has also clearly met its statutory obligation of notifying USCIS, there remained a possibility that a bona fide termination of the employee had never occurred. Therefore, when combined with other factors, failure to properly notify
USCIS by filing a formal withdrawal of the petition could subject an employer to potential liability for wages covering the entire term of the initially authorized employment under the certified LCA, regardless of when the layoff actually occurred and whether the employer had expressly notified the former employee and offered him or her the costs of a return trip home.

Specifically, in 2006 the ARB held in *Amtel Group of Fla., Inc. v. Yongmahapakorn* that if an employer clearly tells an employee that he or she is terminated but fails to meet both of the other regulatory requirements of paying for a return trip and notifying USCIS, then it has not effectuated a bona fide termination of employment and the former employee could be awarded back pay for the entire period of the H-1B approved petition.

**Impact of Recent ARB Decision**

Under the Board’s previous strict holding in *Amtel*, an employer was potentially liable for multiple years of back pay to a laid-off H-1B employee if the company failed to timely apprise USCIS of the worker’s termination. In the recent December ARB decision, by holding that a subsequent approved H-1B petition filed by another company effectively ends the LCA wage obligations of the initial H-1B employer, the DOL has to some degree narrowed the former employer’s scope of liability in certain situations even if it fails to properly notify USCIS.

The Board carefully distinguished the facts in its recent decision from the earlier holding in *Amtel* by looking at the complex circumstances surrounding H-1B petitions filed for a single beneficiary by more than one employer, as well as the actions of the employee who had been terminated. Perhaps most importantly for many companies that regularly file large numbers of H-1B petitions on behalf of portable employees, the ARB considered the “complexities that can arise in cases that involve multiple H-1B employers,” including whether subsequent employers would have sought approval of a “new employment” and/or a “change of employer” H-1B petition on behalf of a particular beneficiary. The Board held that a fundamental difference between a former employer and a current employer in such situations materially changes the analysis of what constitutes a bona fide termination of the beneficiary when more than one petitioning employer is involved. Essentially, the Board determined that when a subsequent employer’s petition was approved by USCIS in a manner that only legally permitted the beneficiary employee to work for the new petitioning company, the prior petitioning employer’s back pay wage obligations are cut off.

Not only does this determination provide some relief for employers that fail to notify USCIS of employee terminations, the DOL also candidly acknowledged the portability of H-1B employees among various modern businesses:

Thus, a strict reading of *Amtel* would suggest that each time an H-1B nonimmigrant ports to a new employer, the former employer would remain liable for back wages until it provides the nonimmigrant with the cost of return transportation. Instead, we think that back wage claims against a former employer must stop accruing if it is clear that the H-1B employee changes from one H-1B employer to another and USCIS approves the subsequent H-1B petition allowing for the change.

This important new distinction more accurately reflects the reality facing many employers that regularly hire portable H-1B employees, and to some extent employers are now protected by a subsequent company’s approved H-1B petition on behalf of an individual who has been terminated. Nevertheless, the burden remains
with an H-1B employer facing layoffs to effectuate a bona fide termination by carefully meeting all their obligations—including clearly telling the employee facing termination, paying the reasonable costs of a return trip home, and notifying USCIS of termination of employment. In addition, while not strictly required by law to establish a bona fide termination, it would be prudent for employers to withdraw the certified LCA with the DOL to help cut off any potential back pay liability.