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Risks Of Including H-1B Workers In Companywide Pay Cuts

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In a recent Law360 guest article, a highly respected and experienced colleague contends that, as long as required wage conditions are met, an employer can reduce H-1B wages without an amended petition and corresponding labor condition application — even below the rate of pay on the I-129 petition — pursuant to an across-the-board pay cut during the coronavirus pandemic.

We take a more conservative approach. We believe that the Fraud and National Security Division of U.S. Citizenship and Immigration Services is likely to see payment of less than the I-129 rate as an H-1B violation.

We also are concerned that any pay cut could expose the employer to back-pay liability under several administrative decisions of the U.S. Department of Labor, although this is not so clear.

Though our advice is more conservative than our colleague's, we agree that employers should be permitted to include H-1B workers in companywide pay cuts without incurring the cost of filing amended petitions — as long as required wage conditions are met and the new actual wage is documented. We discuss the authority and precedent for this position below and urge the DOL and the USCIS to issue clear guidance allowing it.

Our Colleague's View

In his article "Challenges in Lowering H-1B Worker Pay During Pandemic," David Grunblatt says that an employer can reduce the wage of an H-1B employee in a companywide pay cut without filing an amended petition or labor condition application, or LCA, provided the reduced rate meets "required wage" conditions, i.e., meets or exceeds the higher of the prevailing wage (which is based on a survey) and the new actual wage (which is the wage paid to comparable co-workers in the specific job or, if none, the H-1B worker).

The article also says that the employer can pay less than the rate on the I-129 petition with minimal risk of DOL liability. The rationale is that the required wage level is tied exclusively to the actual and the prevailing wage elements without regard to the I-129 rate.

The Fraud and National Security Division View

In an H-1B audit, the USCIS Fraud and National Security Division could view the payment of less than the wage represented on the I-129 petition, and possibly the LCA, as an H-1B violation and an indicator of fraud and abuse.[1] Although it is hard to see how this entails the necessary element of intent to defraud, no employer wants to be the test case. The FDNS may not be as concerned about a pay cut if the worker continues to receive at least the I-129 rate.

The DOL Administrative Review Board Cases

We are less concerned about the risk of potential back-pay liability in a DOL Wage and Hour Division enforcement proceeding, provided required wage conditions are met and that the

new actual wage system is documented in the public access file.

However, some Administrative Review Board decisions give us pause because these state in sweeping terms that changed economic conditions do not allow an employer to cut a worker's pay — even back down to the LCA or I-129 rate after a pay raise.

These decisions also state that an employer who consistently pays a salary higher than the LCA rate but reverts to a lesser amount must pay the higher amount as the actual wage.[2] The Administrative Review Board in these cases only allows a pay cut if it is voluntary or after a bona fide termination.

For example, the H-1B worker in Administrator, Wage and Hour Division v. Efficiency3 Corporation[3] originally received the I-129 rate of $46,000, which was raised to $47,380. After losing a major government contract, the employer reduced the wage by varying amounts. Depending on the pay period, the employer paid less than the offered rate but more than the prevailing wage or far less than the prevailing wage.

The Administrative Review Board dismissed the employer's argument that the pay cut was justified by changing economic conditions. (The employer's argument was based on a provision in the Field Operation Handbook of DOL's Wage and Hour Division, discussed below, and may have succeeded had the employer documented a changed actual-wage system).

The Administrative Review Board affirmed an award of back pay based on the amount the worker received after his raise — $47,380 — finding that the raise reset his actual wage and established a new required wage.

Although the Wage and Hour Division could rely on these cases in an enforcement action, a review of their facts suggests they may not be inconsistent with a reduction that meets required wage conditions and is properly documented.[4] Many of these cases involved such serious noncompliance as failure to pay the prevailing wage, and failure to prove or document changes to the actual wage and pay scale.

Authority Supporting our Colleague's View

Although we take a more cautious approach, we believe that our colleague's view is supported by the DOL's actual wage regulation, internal DOL guidance and prior informal administrative guidance, which may be helpful to an employer in a wage and hour investigation.

We think that the DOL and USCIS can and should rely on these authorities to issue new guidance clarifying an employer's ability to reduce H-1B wages pursuant to a legitimate across-the-board pay cut during the pandemic.

The Actual Wage Regulation

The DOL's actual wage regulation supports an employer's ability to modify its actual wage system in response to a pandemic and to reduce an H-1B worker's actual wage accordingly without an amended petition. This is because it implicitly recognizes the dynamic nature of real-world pay systems.

Although the Immigration and Nationality Act says that both elements of the required wage

shall be based on the best information available at the time of filing the LCA, the actual wage regulation is forward-looking.[5] It says:
Where the employer's pay system or scale provides for adjustments during the period of the LCA — e.g., cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation — such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage).[6]

Of course, the employer must ensure that the H-1B worker is always receiving the correct wage relative to comparable co-workers and must document the change to its actual wage system.[7] Since the regulations allow an increase in the required wage without an amended petition, it follows that a decrease that meets required wage conditions should be permitted without saddling already strapped employers with the costs of amended H-1B petitions.

Wage and Hour Division Internal Guidance

An employer also could justify the wage reduction based on Section 71d09(d)(7) of chapter 71 of the Wage and Hour Division Field Operations Handbook, which says:
Changing economic conditions (or other valid factors) can require that an employer make substantive changes to its actual wage system; the actual wage can go up (e.g., merit increases, cost of living, promotions, etc.) or down (e.g., wage reductions). At the time that the actual wage change occurs, it should be recorded in the public access file (see 20 CFR 655.760(a)(3)). If the actual wage changes, whether higher or lower than the rate of pay on the LCA, there is no need for the employer to file a new LCA to record it because it is recorded in the public access file.[8]

Interestingly, the Wage and Hour Division did not dispute the validity of this handbook provision in Efficiency3, when the employer relied on it to justify a wage reduction.

Rather, the Wage and Hour Division argued that the provision applies only where the employer has a wage system encompassing comparable co-workers, which the company in Efficiency3 lacked because there were none. Further, the employer failed to document the actual wage change in its public access file.

While Section 71d09(d)(7) supports an employer's ability to reduce a wage under appropriate circumstances, it may not be binding on the Wage and Hour Division in an investigation.

Although the Wage and Hour Division recently confirmed the validity of chapter 71 in a meeting with the American Immigration Lawyers Association, it said that the chapter is not external-facing, suggesting that the DOL may not have to follow it.[9]

Moreover, at least one administrative law decision held that the Handbook does not have the force of law.[10]

Prior DOL and USCIS Guidance

Informal guidance provided by the DOL and Bureau of Citizenship and Immigration Services, USCIS' predecessor, also supports an employer's ability to include H-1B workers in otherwise lawful companywide pay cuts in response to the pandemic.

In 2003, the American Immigration Lawyers Association asked the following:

> Where an H-1B is earning more than the prevailing wage but, due to across-the-board salary cuts, is earning less than the salary listed on Form I-129, and the reduction complies with DOL LCA regulations, we believe that this would not be considered a material change and that no notice would be required to BCIS in connection with the approved H-1B petition. Please confirm.

BCIS responded:

> The BCIS has consulted with the U.S. Department of Labor. The DOL is sensitive to the fact that wages can and sometimes do go up and down based on economic conditions. In the circumstance described in your question, there would be no need for a new LCA or a new I-129 petition provided that the employer was still paying the "required wage" [meaning the higher of the applicable prevailing wage or actual wage]. Any change in the beneficiary's wage rate must be disclosed in the next H-1B petition filing with the BCIS. It is important that any wage change be documented in the employer's LCA public disclosure file and disclosed to the BCIS in the next H-1B filing.[11]

While this guidance supports our colleague's position, it may not be binding on the DOL or USCIS given its age, informal nature and its inconsistency with the FDNS' current posture.

However, it would support the issuance of new DOL guidance, which the FDNS could follow, allowing employers to include H-1B workers in legitimate across the board pay cuts, provided that required wage conditions are met and that the modified actual wage is properly documented.

Conclusion

To avoid the cost of filing amended petitions, some employers are leaving H-1B wages intact while they reduce the pay of their American workers, which is not what Congress had in mind.

The pandemic is presenting businesses with unprecedented existential challenges. USCIS and the DOL should consider how well-meaning H-1B regulations and the threat of liability are unintentionally putting critical and legitimate cost-saving measures beyond the reach of companies that rely on H-1B talent, and should issue appropriate guidance.

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[1] An amended H-1B petition and new LCA are required to notify U.S.CIS of "material

changes in the terms and conditions of employment." 8 CFR §§214.2(h)(2)(i)(E), 214.2(h)(11)(i)(A). Although the materiality of a wage cut should seem to depend on the facts, FDNS sees payment of anything less than the I-129 or LCA wage as an abuse. See Minutes of AILA Verification and Documentation Liaison Committee with FDNS, 3/28/12, Question 6, "Scope of Audit/Audit Process," (AILA Doc. No. 12060144) (not approved by FDNS). Also See "Combating Fraud and Abuse in the H-1B Visa Program," https://www.uscis.gov/report-fraud/combating-fraud-and-abuse-h-1b-visa-program.

[2] See, e.g., Admin'r, Wage & Hour Div. v. Efficiency3 Corp., 15-005, 2014-LCA-7 (ARB Aug. 4, 2016); Administrator, WHD v. Government Training LLC, 2015-LCA-5 (Feb. 24, 2016), aff'd, 2015-LCA-005 (February 23, 2018); Mao v. Nasser, 2005-LCA-36 (ALJ May 26, 2006), aff'd 06-121 (ARB Nov. 26, 2008), AILA Doc. No. 08072962, citing Admin'r, Wage & Hour Div. v. Novinvest LLC, 2002-LCA-24 (ALJ Jan. 21, 2003); Matter of Edmundo Vicuna v. Westfourth Architecture P.C., 2012-LCA-00023 (Jan. 16, 2015).

[3] Admin'r, Wage & Hour Div. v. Efficiency3 Corp., 15-005, 2014-LCA-7 (ARB Aug. 4, 2016).

[4] For example, the pay cut in Administrator, WHD v. Government Training LLC, supra, was not pursuant to an across-the-board reduction. Similarly, the pay cut in Matter of Edmundo Vicuna v. Westfourth Architecture, P.C., 2012-LCA-00023 (Jan. 16, 2015) caused the H-1B wage to fall below the prevailing wage and the employer produced no evidence of a new actual wage system or show that the new rate was proper in that context.

[5] INA §212(n)(1)(A)(i)(II).

[6] 20 CFR §655.731(a)(1).

[7] 20 CFR §655.731(b)(2).

[8] But see Order Denying Efficieny3's Motion to Reconsider, Administrator v. Efficiency3 Corp., ARB No. 15-005, slip op. at 3-4 (Oct. 12, 2016), referenced in footnote 59 of Magers v. Seneca Re-Ad-Industries, supra, which we are unable to locate.

[9] The Division confirmed this in an October 2019 meeting with AILA's DOL Liaison Committee. See AILA Doc. No. 20010730.

[10] Magers v. Seneca Re-Ad-Industries, Inc., ARB Nos. 16-038, -054, ALJ No. 2016-FLS-3, footnote 59 (ARB Jan. 12, 2017).

[11] Submitted by Greg Adams, Chair, AILA Service Center Operations Liaison, Approved by Steve Bucher for Service Center Operations, AILA Doc. No. 03080713.