

Employers Seeking Visas May Tangle With Labor Dept. Over Wages (Corrected)

By Laura D. Francis

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- Uptick in Labor Dept. investigations overall, but extent depends on region, investigator
- Outside seven Midwest states in Eighth Circuit region, agency still launches full investigations of visa practices after single wage complaint
- DOL enforcement strategies likely to change over next year as political appointees get settled

Employers focused on getting their skilled guestworker visa petitions approved by U.S. Citizenship and Immigration Services could face another obstacle: the Labor Department.

There's been an uptick in investigations by the DOL's Wage and Hour Division, which has authority to enforce the wage requirements of the H-1B skilled worker visa program.

The DOL, like the other agencies involved in the immigration process, has been tasked with finding ways to ensure that U.S. workers are prioritized over immigrant workers. President Donald Trump's Buy American and Hire American executive order specifically mentions the H-1B program as needing an overhaul.

So far for the Labor Department, that's translated into more frequent and extensive investigations, depending on the region and investigator.

That's created additional challenges for employers, which already have to comply with rules requiring H-1B workers be paid a certain wage level so as not to undercut U.S. workers' wages. And in at least one case, the DOL accused an information technology company of discriminating against U.S. workers in favor of H-1B workers.

"Much greater" activity has been seen on the East Coast and down South, Immigration attorney Robert White said, adding that he hasn't seen as much of a bump around Chicago.

But White, who practices with Masuda, Funai, Eifert & Mitchell in Schaumburg, Ill., told Bloomberg Law there's been an overall increase nationwide.

Not only are investigations getting more numerous, but the DOL continues to assert authority to carry out thorough investigations of employers' H-1B practices, said White, a member of the American Immigration Lawyers Association's DOL Headquarters Liaison Committee.

Can One Complaint Open Door Wide?

In 2015, the U.S. Court of Appeals for the Eighth Circuit ruled that the DOL couldn't use a single complaint to launch a full investigation of a company that employs H-1B workers. Rather, the investigation has to be limited to the allegations in the complaint, the court said.

But the DOL won't follow the Eighth Circuit's ruling outside of the states covered by that court: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

"The Department follows" the court decision in the Eighth Circuit, a DOL spokeswoman confirmed to Bloomberg Law.

In other parts of the country, "for purposes of investigation and enforcement, they will follow the historic practice of using a single employee complaint to justify the initiation of a wall-to-wall enforcement investigation," Woodbridge, Va., immigration attorney Mary Pivec told Bloomberg Law.

That typically requires giving the DOL the names of and information about all of the company's H-1B workers, regardless of where they work, what they do, or the nature of the complaint, she said.

This enforcement approach is "not totally surprising," Becki Young of Hammond Young Immigration Law in Silver Spring, Md., said.

"This administration is dead set on really increasing its enforcement efforts" in immigration, she told Bloomberg Law. The numbers and types of investigation are often dependent on location and even an investigator's whim, so consistency doesn't appear to be a concern, she said.

How Much Legal Authority?

The DOL asserts that it has legal support for its position, White said: an administrative decision recognizing the agency's authority to determine the course of an investigation after it receives a complaint. That decision was upheld by a federal district court in September 2017.

The case is on appeal before the U.S. Court of Appeals for the Second Circuit, which covers Connecticut, New York, and Vermont.

"It all depends on the investigator," White said. "Some investigators will say we have the authority to investigate everything, but I'm limiting it to X," while others will investigate everything, he said.

"Going forward is what's going to be interesting," White said.

The DOL is just now getting its political appointees in place, and they could change the direction of the agency's immigration enforcement efforts, he said. There are "a lot of unknowns at this point," he said.

U.S. Worker Underpayment

One possibility is a shift toward investigations of employers accused of underpaying U.S. workers in relation to their H-1B workers. That's what Pivec says her client is currently facing.

The DOL told her it's investigating a claim that H-1B workers are unfairly getting paid more than similarly situated U.S. workers. But there's ample evidence to the contrary, she said. "We are cooperating with objection" in the investigation, said Pivec, who practices with Pivec & Associates in Woodbridge, Va.

The Labor Department said it doesn't conduct that type of investigation.

"The statutory provisions of the Immigration and Nationality Act do not provide the Wage and Hour Division with the authority to investigate complaints that H-1B workers are paid more than similarly situated U.S. workers," a DOL spokeswoman said in response to Bloomberg Law's question about the investigation.

The Justice Department's Immigrant and Employee Rights section can prosecute citizenship-status discrimination, but only with respect to hiring and firing, not wages, Pivec said. That means a U.S. citizen with a wage claim should file a national origin discrimination charge with the Equal Employment Opportunity Commission or corresponding state agency, she said.

"The Department of Labor vigorously enforces all laws within its jurisdiction to protect American workers and level the playing field for law-abiding employers," the agency spokeswoman said.

'Irony' of H-1B Rules

"I'm not actually aware that there's a prohibition on H-1B workers actually being paid more" than U.S. workers, Young said.

"The H-1B regulations and the statute are designed to make sure that H-1B workers don't undercut the salaries of U.S. workers," she said. The "irony" is that in some instances employers may pay H-1B workers more than U.S. workers, she said.

Under those rules, employers must pay H-1B workers the higher of the actual wage paid to employees in that job or the "prevailing wage" determined by the DOL. If the prevailing wage is higher than what the employer pays its workers, H-1B workers, but not U.S. workers, have to be paid that amount, Young said.

And with the USCIS questioning why employers are only paying H-1B workers entry-level wages, employers are increasingly looking at ways to pay them more, Young said.

"When you are dealing with professional employees, there are just so many variations in terms of setting salary," Pivec said. "It seems to me that DOL would be in a very difficult place" if it tried to find two professional employees who were materially the same in terms of job duties, experience, education, and special qualifications, she said.

(Story corrected to clarify that the DOL asserts it has authority to conduct broad investigations based on a complaint.)

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