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Client Alert: Catch 22 - Potential Nonimmigrant Visa Issues Employers Should be Aware of Due to Furloughs and Shut Downs as a Result of COVID-19

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RELATED ATTORNEYS

Maria del Carmen Ramos

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

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What employers are going through today is something that hasn't been seen in more than a century. To stem the tide of a global pandemic, more and more state and local governments are entering "Stay at Home" or "Shelter in Place" orders requiring businesses to shut down and close their doors. As time passes, these types of orders are bound to increase in frequency, as least in the short run. While the "Stay at Home" or "Shelter in Place" orders are well-intentioned, they are having an unintended consequence: employers are being forced to furlough or lay off employees. As if having to furlough employees isn't bad enough, employers may be subject to sanctions for failing to pay H-1B, H-1B1, and E-3 workers while furloughed.

Here's why: unlike employees in the U.S. on other non-immigrants visas, workers here on H-1B, H-1B1, and E-3 visas are subject to the Department of Labor ("DOL") regulations governing Labor Condition Applications (often referred to as an LCA). To ensure that the hiring of a foreign H-1B, H-1B1, or E-3 worker does not adversely affect the wages or working conditions of similarly situated U.S. workers, the LCA requires employers to pay H-1B, H-1B1, and E-3 workers, at a minimum, the local prevailing wage, which is defined as "the average wage paid to similarly employed workers in a specific occupation in the area of intended employment."

Generally, an employer is obligated to pay H-1B, H-1B1, and E-3 workers the prevailing wage, even if they aren't working. For instance, 20 C.F.R. § 655.31(c)(7)(i) mandates that an employer pay an H-1B nonimmigrant who "is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason."

But, there is one exception: under 20 C.F.R. § 655.31(c)(7)(ii), the employer need not pay the H-1B worker who is not performing work if the employee is experiencing a period of nonproductive status becauseof (i) "conditions unrelated to employment" that take the nonimmigrant away from his or her voluntary duties at his or her voluntary request and convenience, such as caring for a sick relative; or (ii) conditions that render the employee unable to work, such as maternity leave or a car accident that temporarily incapacitates the employee.

The dilemma is determining whether H-1B, H-1B1, or E-3 workers who are furloughed because of a Stay at Home order are in a "nonproductive status" because of the employer's decision (such as lack of work) or because of conditions unrelated to employment.

It's easy to envision, in the case of a H-1B worker furloughed because of a Stay at Home order, an argument that the worker is not in a nonproductive status because of the employer's decision. Take a dental practice, for example. Under some Stay at Home orders, dental practices are forbidden from performing elective procedures. So it is the Stay at Home order, not a lack of demand for services, that has forced the employee into a nonproductive status. But there are three problems with that argument.

First, the regulations appear to distinguish between nonproductive status caused by the employer and nonproductive status caused by the employee. While a furlough resulting from a Stay at Home order wasn't caused by the employer, it certainly wasn't caused by the employee.

Second, there is no legal authority directly on point. Nor is there any guidance from the DOL. We are hopeful that the DOL will issue guidance over the next few weeks.

Third, this isn't an academic exercise. While there are certainly arguments that the reason furloughed workers are in nonproductive status is not because of the employer's decision, a literal reading of the regulations can support an argument that it is the employer's decision. After all, the regulations say it is the employer's decision when the nonproductive status is the result of a lack of assigned work. And the reason the workers are being furloughed is literally because of a lack of work, even if the lack of work is caused by a Stay at Home order, as opposed to lack of demand. Unfortunately, the consequence of getting the answer to this question wrong can be severe.

If an employer violates the prevailing wage requirement, the DOL's Wage and Hour Division is authorized to assess civil monetary penalties with maximums ranging from $1,000 to $35,000 per violation, depending on the types and severity of the violations. Employers may also be precluded from future access to the H1-B and other programs for one to three years if they commit certain violations. Not to mention, the employer can be liable to the H-1B, H-1B1, and E-3 worker for back wages (i.e., wages not paid during the furlough).

Putting aside the prevailing wage requirement, H-1B, H-1B1, and E-3 employers face another problem. Even if the employer is not required to pay its H-1B, H-1B1, or E-3 workers while they're furloughed, it may still need to amend its petition. Keep in mind, the LCA, which the employer signed under oath, represents that the employer has agreed to pay the employee a rate of pay that ranges from the prevailing wage the amount specified in an employment agreement or offer letter.

If there is a *minor* change in the employee's work schedule that may affect his or her wages (i.e., the employee is out on maternity or other approved leave), an amendment is not necessary. Material changes to the terms and conditions of employment necessitate an amendment. But, if the employer changes the employee's work schedule so that *it will be practically certain* the employee will not earn the salary specified in the nonimmigrant visa petition, the better practice would be for the employer to amend the immigrant petition.

So, these are uncertain times for employers. We are optimistic the DOL will issue guidance soon that will help clarify the prevailing wage issue for employers.

Continue to check back with us for updates. In the meantime, our firm is available to assist with your immigration needs. For more information, please contact Maria del Carmen Ramos at 813.227.2252 or mramos@shumaker.com.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.

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