Workforce MANAGEMENT

What Employers Need to Know About Terminating Foreign Workers

Among the most sensitive of layoff matters are the consequences of terminating foreign workers and the affirmative obligations of employers under federal regulations. This article will assist human resources professionals in identifying issues that require compliance with federal regulations. It also addresses the consequences of termination for the foreign worker.

By Colleen L. Caden

With the unemployment rate in the U.S. reaching a 16-year high in 2009, reductions in workforce have become a reality in nearly every industry. During this era of corporate downsizing, human resources professionals are required to be agile and expert at managing a wide range of issues. Among the most sensitive of these matters are the consequences of terminating foreign workers and the affirmative obligations of employers under federal regulations. The following article will assist human resources professionals in identifying issues that require compliance with federal regulations of the Department of Labor and U.S. Citizenship and Immigration Services. The article also addresses the consequences of termination for the foreign worker.

Overview

For immigration purposes, a layoff is defined as any involuntary separation of an employee without cause or prejudice. Terminating a foreign worker during a corporate downsizing has an immediate impact on the worker's visa status as well as on his dependents' status. Specifically, a foreign worker sponsored by an employer for an employment-based visa is required to maintain his immigration status by rendering services for compensation. The day the foreign worker stops rendering services for the employer is the day he stops maintaining his status.

It is important to note that an employer's severance package does not maintain the foreign worker's lawful status in the United States. There is no "grace period" for a foreign worker to remain in the U.S. after he has been laid off. The foreign worker must act quickly to maintain his legal status while he is in the process of either looking for another job or wrapping up his affairs prior to departing the country. It is therefore advisable for a laid-off foreign worker to seek legal counsel immediately to determine whether filing an immigration petition with USCIS to change his and his family members' immigration status to that of a visitor is the best course of action. By changing to visitor status, the foreign worker will be given the opportunity to remain in the U.S. to wrap up his affairs, including selling property and closing bank accounts. Finally, for a foreign worker who is the beneficiary of a pending green card

application, the legal issues can become even more complex.

Foreign workers on temporary employment visas

H-1B Specialty Occupation Visa:

An employer may hire a highly skilled professional worker on an H-1B specialty occupation visa for up to six years. The H-1B classification requires the employer to make a number of attestations to the Department of Labor and USCIS regarding the number of hours the foreign worker will render services as well as the salary that the foreign worker will be paid. These attestations are made in the labor condition application. In a corporate downsizing, any changes to these terms of employment, such as a reduction in hours, a pay cut or a termination, require that the employer notify USCIS. Employers who do not comply with these statutory requirements may be liable for penalties for noncompliance.

The H-1B regulations also require the employer to offer the foreign worker the reasonable cost of return transportation to his home country. The employer is not required, however, to pay for the cost of returning family members and their belongings to their home country.

O-1 Extraordinary Ability:

Employers that hire a foreign worker in O-1 visa classification and then terminate that worker are jointly and severally liable for the reasonable transportation costs of the worker's return trip home.

TN (Treaty NAFTA) and L1 Intracompany Transferees:

The TN classification is an employer-sponsored visa for Mexican and Canadian nationals to enter the U.S. to work in specific professional positions outlined in the North American Free Trade Agreement. The L-1 visa classification is reserved for foreign workers who have transferred to the U.S. to work for the parent, subsidiary, branch or affiliate of the international company they worked for outside the United States.

Upon the termination of a TN or L-1 foreign worker, there is no affirmative regulatory requirement for the employer to notify USCIS or pay the cost of return transportation to the foreign worker's home country.

Green card applications

Since foreign workers are employed on temporary visas that are valid for a finite period, employers seeking to retain foreign talent often sponsor them for green cards. Upon receiving a green card, a foreign worker becomes a lawful permanent resident with the legal right to live and work in the U.S. indefinitely.

Employment-sponsored green card applications are prospective offers of employment. More specifically, this means that at the time the green card application is approved by USCIS, the employer must employ the foreign national in the job identified in the application. Obtaining a green card through employer sponsorship can take many years—in some cases, upwards of eight years—and typically involves filing applications with the Department of Labor and USCIS. The consequences of terminating a foreign worker with a pending green card application can present a host of issues that may vary depending upon the status of the application.

There are employment-based green card applications in which foreign workers may sponsor themselves, including the Extraordinary Ability and National Interest Waiver classifications. In these instances, a foreign worker's application is not affected by termination. Rather, the applications require evidence of a job offer in the field of expertise upon the approval of a green card application.

Labor certification PERM applications

Most foreign workers are sponsored for green cards via labor certification applications known as PERM. In a PERM application the employer is required to demonstrate that it tested the U.S. job market and was unable to find a minimally qualified U.S. worker to fill the position. PERM applications are employer-specific and cannot be transferred to another employer by a terminated foreign worker. Upon terminating a foreign worker who is the beneficiary of a pending or approved PERM application, the employer is not permitted to substitute another foreign worker into a pending or approved PERM application. Upon termination of the foreign worker, the employer may withdraw the PERM application.

Immigration visa petitions

Upon the Labor Department's approval of a PERM application, the employer proceeds to USCIS and files an immigrant visa petition (Form I-140). In this second step of the process, the employer attests in the immigrant visa petition that it intends to offer the foreign worker the position and wage cited in the PERM application and that the foreign worker possesses the qualifications set forth in the application. If the foreign worker is terminated while an immigrant visa petition is pending or after it is approved, the employer may withdraw the petition.

Adjustment of status

The third step in the green card process requires the foreign worker to file an adjustment of status (Form I-485) application with USCIS. Unlike the PERM application and the immigrant visa petition, the adjustment of status application is the foreign worker's application before USCIS for permanent residence. If the foreign worker is the beneficiary of an approved immigrant visa petition (Form I-140) and his adjustment of status (Form I485) application has been pending more than 180 days, the foreign worker is eligible to retain his green card application and "port" it to another employer. This portability provision allows foreign workers to transfer their green card applications to new employers as long as they continue to be employed in the same or similar occupation cited in the PERM application. Green card applications that are portable require no further legal obligations of the sponsoring employer. To demonstrate to the USCIS that the foreign worker meets the portability requirements, the employer may be asked to provide copies of the approved labor certification application and the immigrant visa petition approval notice.

Conclusion

In this era of corporate downsizing, the ramifications of terminating a foreign worker can be particularly challenging for all parties involved. Employers must be compliant with federal regulations and foreign workers must act quickly to maintain lawful immigration status. Since the facts of each situation can present complex legal and timing issues, it is advisable to work with competent legal counsel throughout the separation process.

The information contained in this article is intended to provide useful information on the topic covered, but should not be construed as legal advice or a legal opinion. Also remember that state laws may differ from the federal law.

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