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Immigration Alert: Important Employer Obligations to Consider During an Economic Downturn

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The current economic downturn is requiring many of our clients to begin looking for creative solutions to increasing budgetary pressures. Many clients may be considering such measures as layoffs, scaling back employee hours, adjusting salaries or benefits packages, "benching" some nonessential employees (the practice of retaining employees who do not report to work, and not paying those employees while they are "idle"), and other such solutions. Employers should be aware of the unique restrictions and issues related to these practices if they impact nonimmigrant employees in H-1B, H-1B1, or E-3 status, as all of these are governed by the Labor Condition Applications (LCA) filed with the Department of Labor (DOL) for the positions in which these individuals are employed. In addition, special precautions must be taken by employers filing PERM applications, not just if the employee has a layoff but if the occupation in question is in a sector affected by the downturn, such as the financial services industry.

Considerations Regarding Nonimmigrant Visas

The LCA is a document filed with DOL for every position that an H-1B, E-3, or H-1B1 Singaporean or Chilean employee will fill. The LCA contains a series of attestations made by the employer, including that it will pay the employee the higher of the prevailing wage for his position or the employer's "actual" wage (*i.e.* what the company pays other employees filling the same position). These attestations also require that the employer offer these nonimmigrant employees the same benefits package as U.S. workers. In addition, nonimmigrants working in positions covered by an LCA may not be subjected to stricter benefits eligibility criteria and may not be treated as "temporary employees" for benefits purposes by virtue of their nonimmigrant status. The benefits received by these employees do not have to be identical to those received by U.S. workers, as long as the same benefits package was offered and these various nonimmigrants voluntarily chose different benefits.

With this in mind, our clients should be very careful about adjusting the salaries or benefits packages of these individuals, as any downward revision would materially change the terms of the LCA and could risk the possibility of dropping below the "prevailing wage" for the position, a violation of the terms of the LCA. Clients should also keep in mind that the LCA specifies whether the position is full-time or part-time. Reducing an employee from a full-time to a part-time position requires the filing of a new LCA and an amended H-1B petition. Transferring employees in H-1B, H-1B1 or E-3 status to a nonproductive status or putting them on leave without pay ("benching") is a violation of the terms of the LCA.

Of course, many of our clients will have no choice but to reduce headcount during the current economic downturn. Keep in mind that employees in O, P, H-1B, or H-1B1 visa status who are involuntarily terminated before their period of authorized nonimmigrant employment ends must be offered the cost of return transportation to the country of their most recent foreign residence, and the employer must notify USCIS that the employee in H-1B status is no longer employed. Employers are not required to provide the same return transportation offer to employees in E-3 status.

Considerations Regarding Program Electronic Review Management (PERM) Applications

If within 180 days prior to filing a PERM application an employer has had a reduction in force in the same or similar occupational category as the job which is the subject of a PERM application, the Employer must inform DOL and must be able to prove to DOL that it has notified and considered the laid-off workers for the PERM position. Most employers will choose not to file a PERM application within 180 days of a layoff, but some may have no choice (if, for example, the employee needs the application filed without delay in order to be able to remain in the United States on a long-term basis). But even where the employer has not had a layoff, if the job which is the subject of a PERM application is in a field affected by today's financial crisis (*e.g.* Financial Analyst), employees must be mindful that DOL is keenly aware of current labor market conditions and the availability of recently terminated workers in these fields. Accordingly, employers must be particularly careful to document their recruitment efforts and be prepared to defend themselves against increased scrutiny by DOL of their PERM applications for such positions.

If you would like more information
on any immigration matter, please contact your immigration attorney at Mintz Levin or visit www.mintz.com.

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