Downsizing Implications for H-1B Specialty Workers and Their Employers

Reducing your workforce is never an easy decision. Worrying about what implications downsizing may have on your H-1B workforce makes these decisions even more difficult. The downsizing of such workers can mean they lose their ability to remain in the United States and their job. Employers of H-1B workers are also subject to additional requirements that do not apply to their U.S. employees.

For example, an H-1B worker's employment terms are subject to those listed in the H-1B petition filed with the government on the employee's behalf by their employer. Any material change to what entity employs the H-1B worker or in their job duties, job location, full or part-time status or salary listed in the underlying current petition generally means the employer must file an amendment petition with the government to notify them of any such changes before they occur. Similarly, employers who obtained H-1B status for an employee also promised the government to comply with additional requirements as part of the petitioning process. The decision to downsize an H-1B visa status holder triggers several requirements that an employer must comply with to avoid being subject to government penalties and incurring ongoing liabilities toward the worker.

Upon the decision to downsize an H-1B worker, the employer must offer to either purchase them a travel ticket to return home or reimburse them for their purchase. If the employee does not plan to return home and instead remain in the U.S. with a different H-1B employer or in a different immigration status, then the employer is not required to provide them with a payment or other benefit in lieu of the return transportation. The employer must also notify both the U.S. Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) that the employee's H-1B employment will end. The employer must continue to pay the worker the wage listed in the underlying H-1B petition until the employer has fully effectuated a cancellation of the worker's petition. Failure to notify the DOL through the withdrawal of the employee's labor condition application and USCIS through a written petition withdrawal request may result in the employer owing wages beyond the employee's termination date. The only exceptions to the continued wage obligation (if there is no fully effectuated cancellation of the petition through notice to the government) are if the worker can successfully begin H-1B employment with another employer or if the worker departs the United States.

POSTED:

Dec 8, 2022

RELATED PRACTICES:

Labor and Employment
https://www.reinhartlaw.com/practices/labor-and-employment

Corporate Law
https://www.reinhartlaw.com/practices/corporate-law

RELATED SERVICES:

Immigration
https://www.reinhartlaw.com/services/immigration

Emerging Businesses and Early-Stage Investing
https://www.reinhartlaw.com/services/emerging-businesses

RELATED PEOPLE:

Benjamin T. Kurten
https://www.reinhartlaw.com/people/benjamin-kurten

Reinhart

Once H-1B employment has ended, the worker may have up to 60 days to remain in the United States from their last day of H-1B work in order to have a different employer file a petition on their behalf and thereby transfer their status to a new employer. They may also change to an entirely different visa status or depart the United States within the 60-day grace period. However, the terminated worker is not guaranteed a full 60 days to find other H-1B employment, leave the United States or change to a different status. Suppose the terminated employee's current admission period as listed on their current I-94 Admission/Departure Record is less than 60 days after the termination date. In this case, the employee will only have until the date of their current period of admission as listed on the I-94 Admission/Departure Record to remain in the United States and change employers or status. USCIS also has the discretion to lessen the grace period afforded to an H-1B worker. In the same vein, USCIS also has the discretion to provide relief to the worker beyond the statutory 60-day grace period. Terminated H-1B workers who can show that extraordinary and compelling circumstances apply to their situation may be able to convince USCIS to use its discretion to return them to H-1B status if they find a new H-1B employer after either the 60-day grace period or, if applicable, a shorter period of admission expiration. Employment during the 60-day grace period is not allowed unless a new employer has filed a change of employer petition on the employee's behalf, or the employee is able to successfully change to a different work authorizing status.

Determining when an H-1B worker's H-1B employment has ended to calculate the 60-day grace period can be complicated and fact specific. Employers and workers should normally consider the last day of paid employment as the last day of H-1B status unless the 60-day rule applies. Unfortunately, USCIS has not officially recognized any form of "garden leave" to legally extend a worker's period of authorized employment. USCIS may therefore consider the day the employee last performed productive service when determining an employee's actual last day of H-1B status regardless of their last day of paid employment. Employees with accrued vacation or those entitled to a period of authorized leave may be able to extend their final day of H-1B employment through either option. As this area of the law is unclear, H 1B workers and employers should be cautious about trying novel approaches to establishing a worker's last day of H-1B employment as other than the worker's last day of paid *and* active employment.

If the downsized H-1B worker cannot find another H-1B sponsor within the 60-day grace period, there may be other options to help them out. H-1B workers who are

also the beneficiary of an approved I-140 Immigrant Visa Petition may apply for a short period of work authorization separate from any petitioning employer if they can show compelling reasons for allowing such authorization. The practicality of this option is limited, given the immense processing time for such applications.

H-1B employees who are married to an H-1B worker may seek to change their status to H-4 dependent status based on their marriage. If their H-1B spouse is also the beneficiary of an approved I-140 Immigrant Visa Petition, they can apply for separate work authorization. They will only be able to resume work after they are granted the new work authorization, which may take more than eight months to be issued. Therefore, this option may be less beneficial than porting H-1B employment.

H-1B workers who cannot find another H-1B employer or receive work authorization through one of the aforementioned pathways may still have options. Some workers may be able to consider changing to a different visa category. For example, the worker may be able to change to F-1 student status to continue their education. Having to leave the United States can feel hopeless, but H-1B workers should keep in mind that sometimes the best option is to depart the United States to avoid falling out of status, seek a new U.S. H-1B employer while they are abroad and then return to the United States once their new H-1B employer has obtained a new petition approval for them. An H-1B worker generally does not have to obtain a new H-1B lottery slot for a cap-subject employer as long as they still have time left on their original six-year H-1B limit.

Employers worried about the implications of downsizing on H-1B employees should carefully review their visa status and other factors that might impact their options. For questions and assistance in determining how to prepare for downsizing as it pertains to foreign workers, please contact immigration attorney Ben Kurten.