

Reducing H-1B Visa Employee Hours

In today's floundering economy, H-1B employers are feeling the crunch of dwindling revenues coupled with mounting overhead costs. Sadly, many employers must lay off employees in order to remain in business. Still others are trying to lower overhead, but holding onto their valued workers. As a result, many of our law firm's employer clients have asked, "is it legal to reduce the hours of the company's H-1B employees in order to keep them on staff and inside the U.S.?" Generally, the answer is an encouraging *yes*. But first, the proper filings must be done.

It is unlawful to move an H-1B visa *full-time* employee to *part-time* status without continuing to pay that employee the agreed upon wage stated in the previously-filed and certified Labor Condition Application, submitted with the H-1B visa petition. But it is legal for an employer to make such a change in the number of hours worked by an H-1B employee, if the proper filings are done.

As an initial matter, what is full-time worker status with respect to H-1B employees? The U.S. Department of Labor ("DOL") generally views full-time employment to be approximately 40 hours per week, but in no case considerably less than 35 hours per week. To make the situation even more troublesome for H-1B employers, the DOL views any significant decrease by the employer of its normal weekly full-time hours to be a movement towards part-time H-1B employment.

So what must an employer do if it wants to reduce its H-1B employee's hours? According to the DOL, the employer must file and receive a *new* certified Labor Condition Application showing that the position being filled by the H-1B employee is now part-time employment. But even if the *new* Labor Condition Application is certified for the part-time position, the employer must still pay the H-1B employee for at least the number of hours stated upon the I-129 petition that the employer initially filed with U.S. Citizenship and Immigration Services ("USCIS") – unless an *amended* I-129 petition is filed, stating the H-1B visa employee's lowered number of work hours.

Fortunately, the employer does not have to wait for the amended petition to be approved by USCIS, before it may impose its work hour changes. Generally, as long as the amended petition has been filed, the changes may be implemented.

The entire process is taken very seriously by the DOL. Indeed, the DOL will prosecute claims against an employer that has knowingly filed an LCA containing misrepresentations or that has failed to pay its H-1B nonimmigrant worker the proper wage. Also, the DOL's penalties can be harsh. Initial and negligent violations may include a \$1,000.00 fine per violation, as well as payment of back wages. But a willful violation can carry a penalty of up to \$35,000.00 as well as other penalties, such as debarment from petitioning of other H-1B visa employees.

Due to the complicated issues involved and potential for exorbitant financial penalties and consequences, an employer and its attorneys should pay careful attention to both USCIS and DOL regulations and statutes when dealing with similar situations.

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