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U.S. DEPARTMENT OF LABOR REVAMPS H-2B WORKER PROGRAM FOR EMPLOYMENT OF NONIMMIGRANTS IN TEMPORARY NON-AGRICULTURAL POSITIONS

Employers of temporary or seasonal foreign workers are going to be affected by recent revisions to the process by which they obtain a labor certification from the U.S. Department of Labor (USDOL) for the temporary employment of a foreign worker in H-2B status. The changes to USDOL's regulations implementing its H-2B worker program were published in the *Federal Register* on February 21, 2012. This final rule will take effect on April 23, 2012.

An H-2B worker is a foreign national admitted temporarily into the United States to perform temporary non-agricultural labor or services for which qualified U.S. workers cannot be found. As a prerequisite to filing an H-2B visa petition with the U.S. Citizenship and Immigration Services (USCIS), an employer must obtain a labor certification from USDOL confirming that (i) sufficient qualified U.S. workers are not available, and (ii) the employment of the foreign worker(s) sponsored will not adversely affect the wages and working conditions of similarly employed U.S. workers.

USDOL's regulations implementing its H-2B worker program are already complex. However, USDOL has deemed it necessary to revise its existing regulations in order to reduce the susceptibility of the program to fraud and to provide a better understanding of program obligations to its users. Ultimately, USDOL hopes to provide more protections to foreign and U.S. workers alike.

How Will Employers be Affected? That it took 144 pages published in the *Federal Register* for USDOL to convey the changes to the public speaks volumes alone. Of the myriad of changes, several differences between the new and the existing H-2B programs will be of particular interest to employers: (i) changes in the process itself; (ii) a "three-fourths guarantee"; (iii) employer obligations for fees and costs; and (iv) fines and penalties.

- i **Changes in the Process** - USDOL has practically revamped its entire H-2B program by going back to the compliance-based certification model that it used for many years before 2008 when it changed to the presently used attestation-based program. After April 23, there will be a 2-step procedure: All employers desiring to hire H-2B workers will have to obtain an approval of their "H-2B Registration" *before* submitting an Application for Temporary Employment Certification (ATEC) and conducting a test of the U.S. job market. The registration process requires employers to confirm the number of positions open, the period for which the need will exist and that such a need is a one-time occurrence, or a seasonal, peak-load or intermittent need. If approved, the H-2B Registration will be valid for up to 3 years.

Under the new procedure, once its H-2B Registration has been approved, an employer is then eligible to file an ATEC. Within 7 business days of filing the ATEC, the employer will receive instructions from USDOL to commence its recruitment of U.S. workers in accordance with the process outlined in the new regulations. Such recruitment activities will include newspaper advertisements, the call-back of, and offer of re-employment to, former U.S. workers from the prior year (including workers who have been previously laid off), the posting of the job order on USDOL's national job registry, and the posting of the availability of the job opportunity at the place(s) of anticipated employment.

- i **Three-Fourths Guarantee** - The new regulations require H-2B employers to guarantee

employment for a total number of hours equal to at least 75% of the workdays in each 12-week period (or each 6-week period if the job order is for less than 120 days). This employment guarantee period commences on the later of the worker's first day of work or the first date of need as advertised in the job order, and terminates on the last day of the job order. Thus, if an employer does not provide the H-2B workers (or corresponding U.S. workers) sufficient hours to satisfy the three-fourths guarantee, the employer must still compensate the employees the wages that they would have earned had they actually worked for the guaranteed number of days.

- i **Employer Obligations to Pay Fees and Costs** - Another area of change worthy of comment relates to the employer's obligation to pay fees and expenses. Under the new rule, the employer will be responsible for paying the reasonable cost of *both* inbound travel expenses (including daily subsistence expenses) for workers who complete 50% of the job order *and* outbound travel expenses (including daily subsistence expenses) for workers who work until the end of the job order, or who are dismissed early. Under the existing H-2B program regulations, employers are liable only for outbound travel expenses and even then only when the worker is dismissed before the end of the certified employment period (unless required in the first work week pursuant to the Fair Labor Standards Act (FLSA)).

In addition, the new rules will require either employers advance their H-2B workers the full cost of visa, border crossing and visa-related expenses, or reimburse them directly for those expenses during the first week of employment. Such expenses are not an employer obligation under existing rules (unless required in the first work week pursuant to FLSA).

- i **Fines and Penalties** - The new regulations make it absolutely clear that a violation "involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition constitutes a separate violation." A monetary penalty of as much as \$10,000 applies to each violation. Other remedies available to USDOL in the event of employer violations include back wages, reinstatement of U.S. workers, revocation of a certified ATEC, and debarment of the employer or its agent or attorney from the H-2B program, as well as "any other action deemed appropriate."

Conclusion

Whether these changes to the H-2B worker program will achieve USDOL's goals of reducing fraud and providing worker protections for both U.S. and foreign workers alike will remain to be seen. However, what is clear from the final rule is that full compliance with the requirements of the H-2B program will require meticulous attention. Due to both the complexity of the program and the potential penalties for noncompliance, employers will need to tread even more carefully when using the new H-2B visa program.

If you have any questions concerning this topic, please contact the member of GrayRobinson with whom you work.

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